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MONOPOLY AND THE LAW

AN ECONOMIST'S REFLECTIONS ON THE *CROFTER* CASE*

I

HOW far apart economists and judges have travelled in their attitudes to monopoly: that is one's most striking impression on reading the judgments in this case.[1] There was not always this difference of view. The early judges abhorred monopoly no less than does the economist; where the modern judge smiles beatifically they grew apoplectic. The early history of the common law shows no favour to trade combinations. In the earliest of these cases, *R.* v. *Journeymen Tailors of Cambridge*,[2] the defendants were convicted for criminal conspiracy, the court stressing that this was an offence at common law. This view of trade combinations continued to be expressed for at least a century and a half. Lord Mansfield stated it quite plainly in *R.* v. *Eccles*[3]—

> "Persons in possession of any articles of trade may sell them at such prices as they individually may please, but if they confederate and agree not to sell them under certain prices, it is conspiracy."

So also in *R.* v. *Mawbey*,[4] *R.* v. *Hammond*.[5] *R.* v. *Bykerdike*,[6] *R.* v. *Rowlands*,[7] *Hilton* v. *Eckersley*,[8] and *R.* v. *Druitt*,[9] though the decision did not always turn on the point, judges went out of their way to make it plain that

[1] *Crofter Hand Woven Harris Tweed Co., Ltd.* v. *Veitch and Another*, [1942] 1 All E.R. 142.
[2] (1721), 8 Mod. 10.
[3] (1783), 1 Leach 274.
[4] (1796), 6 T.R. 619.
[5] (1799), 2 Esp. 719.
[6] (1832), 1 Moo. & R. 179
[7] (1851), 17 Q.B. 671.
[8] (1855), 6 E. & B. 47; *dicta* of Crompton, J.
[9] (1867), 10 Cox 592.

* This article should be read as an economist's supplement to the legal discussion in Dr. Friedmann's article, published in the last issue (6 M.L.R. 1). The latter should be compared for the facts of the *Harris Tweed* case and other British cases.—Ed.

trade combinations were a criminal conspiracy at common law. We know that at least some would-be conspirators were accordingly deterred; for when in 1852 the booksellers were contemplating a price-fixing association, and asked Lord Campbell's opinion, they disbanded themselves on his advising that such an association would render them liable to prosecution for criminal conspiracy.[10]

This position has now been abandoned. As early as 1815 pressure from trade conspirators for recognition of their agreements began to have its weight with some of the judges. In the criminal division they had little hesitation in pronouncing against conspiracies, because they wanted to leave no loophole for trade unions; in the civil division cases affected mainly business men's agreements, and the civil courts had begun to accept conspiracies between business men while the criminal courts were still rejecting conspiracies between their workers. As the legislature gradually extended its protection to trade unions, the urgency of declaring against trade conspiracies seemed to diminish.[11] By the last decade of the nineteenth century the capitulation was complete. The *Mogul* case[12] is the decisive watershed. Since that case, English judges have decided that business men[13] are to be free to enter into whatever combinations are necessary for the protection and advancement of their private trade interests. The public interest, on which the prohibition of conspiracy had rested, has been dethroned from its original place as the deciding factor. Lord Esher's last stand in the *Mogul* case, affirming the combination to be unlawful as against public policy, was not supported by his colleagues in the Appeal Court or by his superiors in the Lords. In the criminal courts no common law prosecution for trade conspiracy could now succeed. In actions in tort, Lord Cave's two propositions—

> "(1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable. (2) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues "[14]

will exculpate a combination for almost anything it is likely to do. And in the law of contract, practically all their agreements will receive the enforcement of the courts. Public policy is still occasionally mentioned, but how little consideration it receives can be judged from the observation of the Judicial Committee of the Privy Council in *Attorney-General of Australia* v. *Adelaide Steamship Company*[15] that—

> "Their Lordships are not aware of any case in which a restraint, though reasonable in the interests of the parties, has been held unenforceable because it involved some injury to the public."

[10] Plant, M., *The English Book Trade*, p. 439.

[11] Up to 1875 the decisions accepting conspiracies were *Hearn* v. *Griffin* (1815), 2 Chitty 407; *Wickens* v. *Evans* (1830), 3 Y. & J. 318; *R.* v. *Selsby* (1847), 5 Cox 495; *Shrewsbury and Birmingham Railway Company* v. *London & North Western Railway Company* (1851), 21 L.J.Q.B. 89; and *Hare* v. *London & North Western Railway Company* (1861), 2. J. & H. 80.

[12] [1892] A.C. 25.

[13] They had still not finally decided how much protection to give to workmen's combinations (*Quinn* v. *Leathem*, [1901] A.C. 495), or to co-operatives (*McElli-strim* v. *Ballymacelligott Co-operative and Dairy Society*, [1919] A.C. 548).

[14] *Sorrel* v. *Smith*, [1925] A.C., at p. 712.

[15] [1913] A.C. 781.

The *Crofter* case reveals how far we have now been led. We knew before that a combine could charge whatever prices it saw fit and hold the public to ransom without interference from the courts. We knew that the court would help it discipline its members by compelling them to obey its rules, however anti-social those rules might seem. We knew that it was free to ruin any outside trader who did not accept its dictates. Now we discover new freedoms. Business men seeking to advance their private trade interests may not only combine with each other, but also bring their workers into the scheme, and promise them part of the swag; even this was hardly in doubt after the decision in *Reynolds* v. *Shipping Federation, Ltd.*[16] Now we know that they may use not only their own workers, but workers in any other industry who happen to belong to the same union. The trader or manufacturer who wishes to keep outside the conspiracy may find himself boycotted by every worker in his district. The householder who prefers Danish bacon to British may find that, at the behest of British farmers, the agricultural workers have persuaded the transport workers not to take him to his office, the laundry workers not to wash his clothes, the shop assistants not to sell to him, and so on, provided that they all belong to the same general union.

II

Why did the judges go back on their original opinion? It is easy, if disrespectful, to picture them as pawns of the capitalist class, serving their masters' wishes even at the cost of the public good; easy, but not adequate. Doubtless some judges, consciously or unconsciously, have acted in the light of their inner conviction that the business man is the pillar of society and that law must serve and protect his ends. But the language to which they give expression is far more subtle than this. Most of the judgments which most strongly support combination are also those which in the strongest language insist on the freedom of the individual to trade on whatsoever terms he please. What has happened is a confusion of the different meanings of a single phrase. The free trade economists were clear enough what they meant by freedom of trade; to them it meant the absence of restraints on prices, emanating whether from government or from private agreement, whether directly by price-fixing, or indirectly by curtailment of supplies. To them freedom meant freedom to enter the market and sell; not freedom to prevent others from so doing; or even freedom to barter away one's right of entry (of which the freedom to sell oneself into slavery is only the most extreme form). The judges confused these freedoms; have chosen to support the second and third, and therefore have become powerful agents in restraining the first. Some may have done this with a deliberate desire to advance the interests of their friends and heroes in the world of big business; most seem merely to have been confused; finding themselves called to deliver judgments on subjects they were never equipped to understand, they threw in their lot with what appeared to them to be the most modern developments. We must remember the atmosphere in which these cases are tried; though the decision is supposed to rest on what is or is not in the public interest, the courts admit no evidence on public policy.

"The question whether a restraint of trade is reasonable either in the interest of the parties or interest of the public is a question for the

[16] [1924] 1 Ch. 28.

court, to be determined after construing the contract and the circumstances existing when it was made. It is really a question of public policy and not a question of fact upon which evidence of the actual or probable consequences, if the contract be carried into effect, is admissible."[17]

As Lord Bramwell commented—

"No evidence is given in these public policy cases. The tribunal is to say, as a matter of law, that the thing is against public policy and void. How can the judge do that without any evidence as to its effect and consequences?"[18]

He is left to work things out for himself from first principles, never having been trained to analyse such economic problems, and it is not surprising that he has gone astray.

Nevertheless, the line of reasoning which began as a defence of freedom has not been content to stay there. By degrees judges came out more and more openly as opponents of competition and supporters of monopoly as a way of life for Britain. There is a long line of *dicta* from the days of Ellenborough, C.J., who upheld a price-fixing agreement on the ground that—

"this is merely a convenient mode of arranging two concerns which might otherwise ruin each other,"[19]

to modern times, when Lord Haldane calmly assures us—

"Unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance."[20]

And Scrutton, L.J., says—

"In view of the fluctuating character of the yearly supply of hops I see nothing unreasonable in hop-growers combining to secure a steady and profitable price, by eliminating competition amongst themselves, and putting the marketing in the hands of one agent, with full power to fix prices and hold up supplies, the benefit and loss being divided amongst the members."[21]

These judges do not merely say that they have no legal power to suppress monopoly; they go rather out of their way to make it clear that they consider monopoly to be in the public interest.

Judges are not unique in holding this view. The fervent belief in the virtues of competition which characterised the Britain of pre-1914 has died. The man in the street, no less than his rulers, has come to believe that competition is outmoded and anti-social, and that its speedy replacement serves the common weal. We have to decide whether this belief is justified or not. If it is acceptable, the judges are to be congratulated for being among the first to recognise a great truth. If it is rejected, a whole

[17] Lord Parker in the *Adelaide* case (*supra*), at p. 797.
[18] In the *Mogul* case (*supra*), at p. 45.
[19] *Hearn* v. *Griffin* (1815 (*supra*), at p. 407.
[20] *North Western Salt Co.* v. *Electrolytic Alkali Co., Ltd.*, [1914] A.C. 467.
[21] *English Hopgrowers, Ltd.* v. *Dering*, [1928] 2 K.B. 174.

programme of legislative reform is needed to cope with the mischief they have done.

It is easy to show how fallacious are some of the arguments used in support of monopoly. Simplest of all is the fallacy that because monopoly benefits some, therefore it benefits all. Even learned judges have succumbed to this; it is implicit in the three passages just quoted; here again is Lawrence, L.J., arguing that the public is not injured if it is asked to pay more—

> "Moreover, even in such a case, the mere intention to raise prices would not establish a case of injury to the public; it would still have to be proved that the intention was to raise prices to an unreasonable extent; for no such intention would be inferred, the reason being that *prima facie* it would be highly improbable that the seller in his own interest would want to fix unreasonable prices."[22]

The fact is that any increase in price makes the consuming public poorer, since it now has less money to spend on other things. As Adam Smith wrote in a classic passage, as long ago as 1776—

> "The interest of the dealers, however, in any particular branch of trade or manufactures, is always in some respects different from, and even opposite to, that of the public. To widen the market and to narrow the competition, is always the interest of the dealers. To widen the market may frequently be agreeable enough to the interest of the public; but to narrow the competition must always be against it, and can serve only to enable the dealers, by raising their profits above what they would naturally be, to levy, for their own benefit, an absurd tax upon the rest of their fellow citizens. The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution, and ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention. It comes from an order of men, whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even to oppress the public, and who accordingly have, upon many occasions, both deceived and oppressed it."[23]

This is advice that every judge should take to heart.

There are, however, more subtle fallacies. One is that monopoly substitutes order and co-operation for chaos and antagonism. The view that there is no order in a competitive system appeals to those who, because they cannot actually see the wheels turning round, cannot realise that there are nevertheless powerful controls which operate it, to make it serve the consumer. Indeed, the true meaning of "to compete" is "to offer the public a substitute"; to serve the will of the market is the essence of competition. It involves antagonism in the sense that it allows the man in the street freedom to oppose business men to each other; to choose what he shall have and who shall serve it to him. Business men dislike this; it forces them to be efficient, and to be moderate in their prices. They see that by co-operating with each other they can take away from the man in the street his only means of subordinating them to his will—his freedom to choose between them, which compels them to seek his favours. Competition ended, the masses must take what their masters

[22] *Palmolive Co. (of England)* v. *Freedman*, [1928] 1 Ch. 264.
[23] *The Wealth of Nations* (Cannan's Edition), Vol. I, p. 250.

allow them. Competition has given way to co-operation if you like, but it is only co-operation between the few for the enslavement of the many.

Does not monopoly, however, reduce the insecurity of the economic system? Did not excessive competition characterise those two terrible decades from 1920, when the fear of unemployment hung like a cloud over millions of lives, and its reality broke so many thousands? Monopoly does, indeed, bring security for the few who are inside it; Lord Haldane is quite right to say that in its absence prices in some industries would fall; what he forgets is that the money the public saves in this way it can spend on buying the goods of other industries, thus increasing employment there. Competition cannot cause a slump. Neither can monopoly either prevent slumps or cure them. It transfers income from poor to rich, and therefore, if anything, reduces employment by withdrawing money from those who would spend it and keep the wheels of industry turning, to those who characteristically save most. It is a complete fallacy to believe that competition causes the standard of living to be lowered; exactly the opposite is true.[24] The lean years were associated with competition, but competition was not their cause. Men swallow the fallacy because they associate slumps with low prices, and booms with high prices. Monopoly may keep prices stable, and may keep them high, but in doing so merely makes some richer and others poorer. There is a world of difference between high prices due to monopoly and high prices due to the great demand of men in employment in prosperous times. We cannot stabilise the demand, the employment and the prosperity simply by stabilising the prices.

All these are the fallacies which have helped to make monopoly acceptable to plain men no less than to judges. To dispose of them is not, however, to destroy the whole case, for there remains one powerful argument, which exceeds them all. The impressive performance of monopoly is its technical achievement. We think of monopolists as owners of large factories working on a tremendous scale with wonderful machines with which workers can do in a day what others do in months. There is no doubt that there are industries where the economies of large-scale production are great, and where large monopolistic concerns are therefore able to produce more cheaply than small competitive establishments. This is beyond question; and so is its corollary that any law which tried to make the emergence of these concerns impossible would be a handicap to economic progress.

But what has this to do with trade combinations? We fall into error unless we distinguish sharply between the kind of monopoly where one firm by its size dominates the market, and that other kind where a number of firms enter into agreement to restrict output and maintain prices. The former may be associated with economies of large scale production; the latter is not. In the sort of arrangement which is typified by the facts in the *Mogul* case, the *Adelaide* case, the *Salt* case, the Motor Trade Association cases,[25] or in *Joseph Evans* v. *Heathcote*,[26] there is no increase

[24] If the monopoly is in an export trade it may be in a position to raise the standard of living at home by exploiting the foreign consumer; but few export industries are able to do this since in foreign markets they usually have to face the competition of other foreign exporters. A monopoly in an export industry usually exploits rather the domestic consumer.

[25] *Ware & De Freville, Ltd.* v. *Motor Trade Association*, [1921] 3 K.B. 40; *Hardie & Lane, Ltd.* v. *Chilton*, [1928] 2 K.B. 306; and *Thorne* v. *Motor Trade Association*, [1937] A.C. 797, overruling *R.* v. *Denyer*, [1926] 2 K.B. 258.

[26] [1915] 1 K.B. 418.

in productive efficiency. There may be some small economies in selling costs; but in so far as they result from diminishing the buyer's freedom of choice, they are not necessarily desirable; and they are in any case usually swamped by the loss of efficiency on the productive side. For a trade combination usually reduces productive efficiency, and this not merely because the stimulus to efficiency, competition, is removed. The whole *raison d'être* of such a combination is usually to prevent the firms with low costs from bringing prices down to the detriment of those with high costs; it usually allocates quotas, preventing the expansion of the low-cost firms, and enabling the inefficient to continue in production. It is a device which simultaneously robs the public and protects the inefficient. Whatever there may be to say in favour of the large firm, there is nothing to be said in favour of trade combinations. However well meaning the judges may have been, they opened a door which could result only in the public detriment.

III

So much for trade combinations; what of that other form of monopoly where a firm by its size comes to dominate the market?

It is true that the emergence of such giants sometimes results in increased efficiency; but we must not too easily be deceived. In the first place, we must not conclude that the desirable pattern for all industry is necessarily the industrial giant. The fact is that the economies of large scale production are greater in some industries than in others. Pig iron is most efficiently produced on a large scale; specialised steels are as cheaply produced by the small firm. The assembly of motor cars calls for large factories; the manufacture of most of the parts to be assembled is efficiently done on a small scale. To run a regular liner service in shipping demands size; tramp shipping is easily done with very limited funds. The number of cases in which large firms are notably more efficient than small is not in fact great; over most of industry the small firm can produce as cheaply as the large. Technical economies are not so great as is supposed; very many large firms are using the same machines as small ones; only they are using more of them. And even where there are technical economies they may well be offset by the administrative difficulties involved in trying to co-ordinate the activities of a large concern, and to minimise the ever-present risk of bureaucratic inflexibility. In most industries, then, large scale confers no economies; in these monopoly has nothing to offer which competition would not be much more likely to secure.

Secondly, we must not lightly assume that all firms which grow in size are to be welcomed as torch-bearers of efficiency; nothing of the sort. This would only be the case if efficiency were the sole basis of expansion. But the fact is that many inefficient firms are able to grow by taking advantage of defects in our social organisation. A firm which has grown because it produces cheaply is to be welcomed; but a firm which has grown solely because it has bought up all the deposits of some essential mineral used by its industry, or all the outlets which the State will license, as in the case of breweries, or all the essential patents; or a firm which has grown by using financial strength to strangle its competitors—such a firm is not necessarily deserving of praise. Monopoly is too great a source of

power for us to accept its emergence save on grounds of the strictest purity. As the late Professor Allyn Young has written—

> "Most of the more weighty discussion of the economic advantages of monopoly have to do with the effect of monopoly upon the aggregate production of wealth measured in terms either of subjective satisfaction or of objective commodity units. Even from this point of view the case for monopoly is exceedingly dubious, and at best, has a validity that is restricted and conditioned in many ways. Moreover, such considerations are relatively unimportant compared with matters like the effect of monopoly upon distribution, upon the scope for individual initiative, upon economic opportunity in general, and upon a host of social and political relations. In short, it is a question less of the relative 'economy' of monopoly or competition than of the kind of economic organisation best calculated to give us the kind of society we want. Until our general social ideals are radically changed, it will take more than economic analysis to prove that it would be sound public policy to permit monopoly in that part of the industrial field where competition is possible."[27]

On the purely economic issues most monopolists hasten to assure us that they intend to keep their undertakings up to the highest pitch of efficiency, and that they will not use their power to exploit the public. But the issue of monopoly is not just a question of whether prices are to be high or low, and output large or small, important as these matters are in a world as poor as ours still is. It is even more a question of opportunity. The spread of monopoly is the spread of privilege; opportunity is denied to those who are outside the ring. In nineteenth-century Britain, men with initiative could rise in industry; in the twentieth century they are locked out, unless they are the sons or favourites of the industrial barons who have assumed control over the country's major industries. A new hereditary industrial aristocracy has replaced the old hereditary landed aristocracy; and the brief vision of democracy which early capitalism seemed to be bringing in the nineteenth century has vanished. The rise of monopoly has meant a concentration of control over great aggregations of wealth in the hands of a few men; in nearly every British industry one man or two, in his own name or that of the ring he represents, can take decisions which may plunge thousands into unemployment, put prices beyond the range of thousands more, suppress new inventions, or ruin all the carefully laid plans of some local authority. The power they possess may be well exercised, but it is arbitrary power. In the nineteenth century we learnt to reject power over society without control by society in the political field; the twentieth is teaching that it is no less vicious in the economic field.

Let us therefore examine more closely some of the steps on which a firm may climb to power without necessarily being efficient. They are not all associated with defects in the law. Thus one of these steps is the superior financial facilities available to large firms. The situation is not as bad here as it is in the United States of America. There big business and banking are indissolubly linked, and denial of finance a major means of strangling the small firm. In this country banks are more closely confined to short term finance; firms are not dependent on them for

[27] "The Sherman Act and the New Anti-trust Legislation," *Journal of Political Economy*, Vol. XXIII (1915), p. 214.

capital; and their power to strangle is much less. But the small firm does meet unnecessary difficulties in raising capital, compared with the facilities available to large firms. The Macmillan Committee recommended in 1931 that this situation should be remedied. If there were adequate sources of finance for small firms, such as a government financial corporation might provide, they would keep alive more easily, and the big firm would not so easily gobble them up. Another device for rising to power is mass advertising. It is not a very secure method, since advertised products compete with one another, and have in addition to face the competition of unadvertised products bought by those members of the public who, for a guarantee of quality, rely more on the advice of their regular retailer than on what they read in newspaper advertisements. Advertising is the reason for the existence of some large firms, but the case against it does not rest primarily on its role as a source of monopoly power. Rather does it rest on the fact that it does not seem to serve any social purpose useful enough to justify the £100,000,000 a year spent on it. Proposals to confine advertising to trade periodicals certainly deserve sympathetic hearing.

Turn, however, to the defects in the law which aid would-be monopolists. The first of these is in the patent law. The theory underlying the grant of the patent privilege is that it is a reward for the inventor: he is entitled for a number of years to a royalty on any use of his invention. In fact, however, the existing patent law confers a privilege not only on the inventor, but also on the user. A firm may buy the patent, and with it the right to exclude all other firms from using the invention, however willing they may be to pay the inventor his royalty. Thus a rich firm can buy up all the most essential inventions in its industry and dominate the market; those inventions which challenge its invested capital it may suppress. Reform this situation, and a number of monopolies would dissolve. Make all patents "licence of right," giving any firm the right to use the invention on paying a royalty to the inventor. This might mean that some doubtful inventions would not be tried out on a commercial scale, since no firm would sink money in the experiment unless assured that only it would benefit; but this is not likely to be common, and any social loss through this source would be more than compensated by ending a system under which valuable inventions are suppressed and delayed, and others used to exploit the public. The Patent Acts have tried to prevent the abuse of patents by giving special powers to the Comptroller of Patents; but experience shows that large abuses call for drastic remedies.

A second defect is that the law permits boycotts and insistence on exclusive dealing. If strong enough, a firm may use a boycott to kill a rival, either by threatening its customers, or by threatening its suppliers. An example of the former is the *Shoe Machinery* case,[28] where the firm insisted on exclusive dealing, penalising customers who wanted to do part of their business with its rivals. The courts have not been presented with a case illustrating the use of boycotts on supplies by a single firm, though there are many cases of its use by trade combinations, as in *Sorrel's* case and the Motor Trade Association cases. Could there be any clearer example of an attempt to restrain trade than the use of the boycott? Yet the Privy Council dismissed the *Shoe Machinery* case on the ground that—

> "By virtue of the privilege which the law secures to all traders, namely that they shall be left free to conduct their own trade in the

[28] *United Shoe Machinery Co.* v. *Brunet*, [1909] A.C. 330.

> manner which they deem best for their own interests, so long as that manner is not in itself illegal, the respondents are at liberty to hire or not to hire the appellants' machines as they choose, irrespective altogether of the injury their refusal to deal may inflict on others. The same privilege entitles the appellants to dispose of the products they manufacture on any terms not in themselves illegal, or not to dispose of their products at all, as they may deem best in their own interest, irrespective of like consequences. This privilege is indeed the very essence of that freedom of trade in the name and in the interest of which the respondents claim to escape from the obligations of their contracts."[29]

Is not this passage of the very essence of that confusion between freedom to trade, freedom to restrain trade, and freedom to dispose of one's own freedom to trade, to which the judges have proved so prone? And the cases where firms have got suppliers to withhold supplies from a rival, instead of being discussed in terms of the desirability or otherwise of this form of restraint of trade, have been made, by some peculiar legal quirk, to hang on the test of conspiracy; curious exercises have been made to show why a boycott engineered by two in combination is worse than a boycott engineered by one giant—the judgments explaining away *Quinn* v. *Leathem* and justifying *Allen* v. *Flood* would make amusing reading were they not so tragic—and after all this the offenders have got away on the ground that their conspiracy was only to promote legitimate trade interests. There was, indeed, some point in the question whether the restraint involved in tying a customer or supplier to a particular firm is an unreasonable restraint. If X contracts to serve as Y's secretary for a year, and to serve no other person during that time, or if A agrees to sell all his output to B, there is a restraint on the freedoms of X and A to enter their respective markets. But it is not necessarily an undesirable restraint. It becomes such only in the hands of a monopolist, for he alone can use it as a device for strangling rivals. The law might well permit such contracts to firms which cannot exploit them, while denying them to others in a monopolistic position. The attempt to apply this principle to one kind of monopolist, the possessor of a patent, failed because when the Bill passed from the House of Commons to the House of Lords, their Lordships so mutilated the relevant section as to render it practically useless. What we need now is a well-drafted clause applying to all monopolists.

A third defect in the law is that it permits price discrimination. Would-be monopolists flourish by extorting special prices and rebates from their suppliers to the detriment of smaller rivals; and they conquer small markets often by temporarily lowering the price there until the local firm is driven out of business; the use of "fighting ships" in the *Mogul* case was an example of this. Price discrimination is another device which, though harmless in the hands of small firms, can be deadly in the hands of monopolists. Parliament has recognised this, and in most cases where it creates monopoly it controls price discrimination—on the railways, in electricity supply and in the hands of other public utilities. What is lacking is the realisation that monopolies which do not emerge with Parliamentary backing are even worse than those which do, and that therefore their actions need even greater control.

These defects in the law all point in one direction. If it is accepted

[29] *Ibid.*, at pp. 342–3.

that the giant concern can only be tolerated where its size is based on efficiency, and that monopoly on any other basis is bad, then it follows that the law ought positively to remove all undesirable aids to size. In the nineteenth century it was taken for granted, more or less, that the market could look after itself. This was obviously untrue of some markets, like transport or gas, but these were taken as exceptions, and special provision was made for them as public utilities. What is now clear is that all markets have to work within a certain legal framework, and that unless the framework is adequate, the market will cease to be free. To keep the market as free as possible should be a positive task of the law. How far is this possible?

IV

It is now commonly believed that American experience has proved the futility of any attempt to control monopoly by law. "See," we are told, "America is the country with the most determined anti-trust legislation, and yet nowhere else are there more powerful monopolistic corporations." On this there are several things to be said.

The first is, that if American experience proves anything, what it proves most is that no law can succeed unless the means are provided for enforcing it. When the Sherman Act was passed it seems to have been expected to operate largely through private parties bringing suits against monopolies. Business men injured by combinations would set it in motion for the recovery of triple damages. Accordingly only very small sums were set aside for public enforcement. In Theodore Roosevelt's day the anti-trust division had only five lawyers; in the 1920's the number never exceeded twenty-five; not until 1938 did it reach fifty. Private enforcement has proved inadequate—apart from anything else it is much too expensive a procedure. Accordingly in 1939 the other Roosevelt multiplied the sums at the disposal of the division; its staff of lawyers reached 200; for the first time the division was able to prepare its cases properly and to make a wide assault on monopoly. The results of this action leave no doubt that anti-trust legislation can be a most effective deterrent of monopolists, and save the public millions of dollars. The first lesson for us, therefore, is that, desirable as it may be to encourage actions in tort to compensate for injuries inflicted, major reliance should be placed on enforcement by a government department with adequate funds. Rather a special kind of government department is required: our traditional repository for powers of this kind, the Board of Trade, has not the machinery. It must be a department with police powers, including men capable of nosing out restraints from the conflicting evidence of witnesses and files of complicated papers; a department with economists trained to analyse the pattern of an industry and the effects of its peculiar restraints; and a department with lawyers, able to present a good case. We need a special "Department of Monopoly Control."[30]

This is the administrative side of American experience. What of the legal side? Can the law really maintain competition? The answer to this

[30] Far and away the best appraisal of the administrative problems involved is the monograph by Hamilton, W. H., and Till, I., for the Temporary National Economic Committee, *Anti-trust in Action*, 1940; it contains also a valuable discussion of such problems as penalties and the enforcement of judicial orders. See also Arnold, T. W., *The Bottlenecks of Business*, New York, 1940.

is in two parts, corresponding to the two different types of monopoly, the single giant and the trade combination.

American experience does indeed prove that it is useless to try to prevent rival firms from merging into big corporations. Much of the confusion, and most of the disappointment associated with American anti-trust experience, have been due to the fact that the Sherman Act did not make plain whether such fusion was to be penalised or not. The Act prohibited monopolies and attempts to monopolise. At first the Supreme Court interpreted this in such a way as to forbid mergers that promoted monopoly; then it changed its mind. The Clayton Act was more specific, prohibiting big concerns from purchasing each other's shares, or even having interlocking directorates—but the corporation lawyers got round this: now one company buys not the shares but the physical assets of the other. If two concerns do not want to compete with each other, no law can compel them to, and it is futile to try to stop them from merging.

In this respect anti-trust legislation has failed; in other important directions, however, it was amply successful. The Clayton Act (now reinforced by the Robinson-Patman Act) forbade exclusive dealing, boycotts and price discrimination, which, as we have seen, are important tools for monopoly-building. These prohibitions have been very effective despite defects in the drafting. One defect was that, since the Acts prohibit these devices "where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce," the courts were left to decide when this condition was fulfilled, and had to plunge into a mass of economic material which judges are not usually trained to interpret. The difficulty could be got round by denying these devices to monopolists, and defining a monopolist as "any person who has a patent,[31] copyright, trade mark, brand, licence or other privilege protected by the law; any person whose purchases or sales amount to one-third of the total sales of the commodity in the United Kingdom; or any person acting in combination with other buyers or sellers."[32] Another defect was that while the Clayton Act applied the prohibition to leases and to contracts of sale it omitted agency,[33] which thereby unnecessarily gave scope for evasion. A third defect was that instead of refusing to sell a commodity X unless the buyer bought also Y, an act forbidden by the law, a seller could put X and Y together, call them one commodity, and refuse to sell them apart;[34] this is another evasion which might easily be stopped up.

If in Britain we were to enact similar provisions to those in the Clayton and Robinson-Patman Acts directed against boycotts, exclusive dealing and price discrimination, and if we were simultaneously to revise the patent law, the market would take a new lease of freedom. Concerns would then have to rely primarily on efficiency as a means of growth. They would be surrounded almost always by numerous smaller rivals, with free and fearless access to supplies (except where these are limited mineral deposits) and to markets; the large firm could not boycott, and could make few gains not wholly deserved on the basis of efficiency. In many cases no further control would be needed to prevent exploitation.

[31] If all patents were "licence of right," patentees could be omitted.

[32] Trade combinations need not be included if their formation is prohibited under some other clause.

[33] *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U.S. 568 (1923).

[34] *Federal Trade Commission* v. *Gratz et al.*, 253 U.S. 421 (1920).

But in some cases, where the economies of large scale are marked, no small rivals could survive. Then the market would be at the mercy of one or two large giants, and more positive controls would be needed. They lie easy to hand; Parliament controls some monopolies by regulating their prices, e.g. electricity concerns, others by limiting their profits, e.g. gas concerns. In other cases there is operation by municipal authorities, by government departments, or by specially created public corporations like the London Passenger Transport Board. Wherever the scale of production is too large for competition to survive, there should be machinery for public control. This is a well-established tradition in Great Britain, only we have limited its application to a narrow field that we choose to call "public utility," and to one or two other special cases, such as the rather inadequate supervision of the Import Duties Advisory Committee over iron and steel prices; what we need now is to extend the principle of public utility control to all cases where the economies of scale must supersede competition.[35]

So much for the giant concern. What does American experience teach about the attempt to prevent rings and combinations between the smaller fry? This, after all, is the type of monopoly much more common in the United Kingdom than is the industrial giant, though of those we have also our share. Here the interpretation of the law provided little difficulty; the Supreme Court wavered only once,[36] and not for long. The experience is overwhelmingly conclusive that trade combinations are easy to smell out, and that their suppression presents little practical difficulty.

Properly to understand what is possible, we must begin by analysing markets into three types. At one extreme are those where the scale of operation is so small that the number of firms is very large, e.g. in this country cotton spinning, road haulage, or retail trade. In such markets no voluntary agreement is stable; the numbers concerned are too large; and a minority will always blackleg and spoil the fun. Experience has proved that an agreement will survive only if the legislature intervenes to impose it on all firms. Competition in such cases has disappeared only because the State has prohibited it; even after war-time concentration, repeal of a dozen Acts would usually restore it in full vigour.

At the other extreme are markets which are so small, or where the scale of operations is so large, that agreement is inevitable and no law can prevent it. With these we have already dealt; anti-trust measures are futile; what is required are positive controls, whether price or profit limitation, or public operation.

The intermediate cases are the most difficult. Here the number of firms is large, but not too large for agreement. There is the inevitable minority which would ruin the agreement, but it can be boycotted. This is also where an anti-combination law is most useful. It can make the agreement a criminal conspiracy; refuse the enforcement of contracts; and give to injured minorities full damages (triple damages under the Sherman Act) at law. American experience shows that the existence of such a law makes it extremely difficult for such combinations to hold together effectively. They have of course sought means of evading it. Not

[35] If all these large concerns were controlled as to profits and prices or publicly operated they might perhaps be excluded from the prohibition of exclusive dealing, since this method of trade is sometimes beneficial, and is only harmful in the hands of uncontrolled monopolies.

[36] *Appalachian Coals, Inc.* v. *U.S.*, 288 U.S. 344 (1933).

all the acts of trade associations are vicious, and not all are prohibited. Those which need to be prohibited are the fixing of prices, the restriction of output, allocation of quotas, imposition of distance limits, compilation of stop lists or agreements express or implied with suppliers to withdraw supplies from outside firms. There are, however, legitimate activities —research, compilation of statistics, promotion of standardisation, representation on public committees, etc. The difficulty arises where legitimate activities are used for illegitimate purposes, as when an association circulates information as to current prices or orders placed or output which its members tacitly accept as indications what prices they should charge or how far to restrict their output. The existence of this possible loophole, however, is not very dangerous unless the group is small enough to exclude blacklegs, or is able to penalise them and get away with it in the courts. So also with that other evasion, "price leadership." This is found where there is some large firm dominant in an industry, surrounded by a number of smaller rivals. There is no price agreement, but all firms take their cue from the leader, and he, by virtue of his strength, exercises the function of bringing recalcitrants into line. If all large firms were publicly controlled this might solve the problem of "price leadership," but even without this the situation can be kept in hand, provided there is an enforcing authority with its eyes open for cases of boycott, exclusive dealing, or price discrimination, since these are the weapons with which price leadership is enforced. If agreement is prohibited, the wings of the large firm clipped, and the small firm encouraged, the market will keep free without much difficulty.

What are the alternatives? Given that business men cannot be left free to do as they please, there are two. One is the German system; to recognise cartels with their quotas and minimum prices, but to take power to supervise them, as under the *Kartellverordnung* of November, 1923. It is well known that this decree was never seriously applied; but assuming that such a decree could be enforced, and that it were possible adequately to supervise the prices and quotas fixed by every single trade association, is this the desirable alternative? To hold this view is to forget that monopoly is not primarily a question of prices; it is even more a question of efficiency, of initiative, of opportunity and of freedom from concentrated power; these are the ends which competition secures more effectively than any other form of organisation. To reject competition and choose price regulated cartels is to miss altogether the meaning of the problem. The other alternative, some socialists would suggest, is nationalisation. Is it really an alternative? Leaving out workers on their own account, there are over a million separate commercial establishments in this country. Is it a practical proposal for a Labour Government simultaneously to take over every one of them? Surely, leaving aside the very big question whether such action would be desirable on its own merits, do not at least the administrative difficulties compel concentrating nationalisation on the most urgent cases, which, apart from industries nationalised for reasons of political strategy, are the cases where large scale economies make monopoly inevitable? However distasteful he may find it, the Labour Prime Minister is bound to leave whole sectors of the economy to private enterprise while he concentrates his energies on key industries. He has therefore to decide whether it is to be monopolistic or competitive private enterprise. He may well want to keep the trade associations because their existence makes it easier to deal with the producers in an industry and

to issue them their orders. But this does not mean that they must retain monopoly powers. Let them negotiate with government, publish statistics, and do all the other legitimate activities of trade associations; but boycotts, price-fixing, quotas and all the other paraphernalia of monopoly must go. Private enterprise can only be retained in so far as it is competitive; in so far as it is retained it must be made to compete.

V

"If the monopoly established by the appellants and their mode of carrying on their business be as oppressive as is alleged (upon which their Lordships express no opinion) then the evil if it exists may be capable of cure by legislation or by competition, but in their view not by litigation"; thus the Privy Council in the *Shoe Machinery* case.[37] This article has sought to indicate the sort of legislation that is needed to carry on the good work which the judges so unfortunately abandoned. It may be summarised as follows—

(*a*) The maintenance of free markets is a positive task to which the police power of the State should be applied; this requires a special department, amply staffed.

(*b*) The Act under which such department operates should prohibit trade combinations, specifying the acts which are outlawed; and should deny to monopolists the use of boycotts, exclusive dealing and price discrimination, specifying what is meant by a monopolist.

(*c*) The patent law should be revised to make all patents "licence of right"; and

(*d*) The principles of public utility regulation or public operation should be extended to all industries where the economies of large scale production necessarily result in the market being dominated by a few large concerns.

We cannot produce complete economic democracy simply by adopting this programme; there are many other points at which business needs to be regulated in the public interest. We need these provisions, however, at least as part of the programme if such private business as is retained after the war is to be made not the master but the servant of the public. This remains almost the only important country without legislation to keep the market free, or at least a general law to control the activities of monopolists. If private groups are not to submerge the public interest, Parliament must take bold action to control monopoly, and now is the time to decide what lines it should follow.

W. Arthur Lewis.

[37] *Supra* at p. 344.

COLLECTIVE AGREEMENTS UNDER WAR LEGISLATION

I. Collective Agreements in General

IN spite of its great practical importance, the collective labour agreement has not been favoured by the attention of English legal writers. This is surprising, because there are few types of contract which have a greater significance for the people of this country.[1] Many types of contract have been analysed in the minutest detail, although their place in the social and economic life of the community is far from prominent. Collective labour agreements govern the livelihood of a very large proportion of the inhabitants of Great Britain and the conditions under which they participate in the productive and distributive effort of the community. But there is no English legal monograph on collective bargaining, and even the textbooks on industrial law and trade union law deal with the subject in a stepmotherly fashion.

And all this in spite of the fact that Britain is the home of the collective bargain.[2] Collective labour agreements were made in this country before they were known abroad. The working out of the technique of the collective legal regulation of conditions of employment by British trade unionists and employers discloses a considerable capacity for creative legal action. It is one of the great legal achievements of the English people which has almost completely escaped the notice of the legal profession.

On the continent of Europe and in the United States of America there has grown up an elaborate legal theory of collective bargaining. On the Continent this goes back to the early years of this century,[3] and it is significant that the early French treatise by Raynaud draws for its illustrations largely on English industrial practice, while developing its conclusions within the framework of French law. In the United States the New Deal legislation, and especially the National Labor Relations Act, 1936, gave a powerful stimulus to legal analysis in this field, and the legal literature on the subject has already reached almost terrifying dimensions.

The reasons for this negative attitude of the English legal profession must be found in the general structure of English legal thinking, and in some special features of the law of collective bargaining. The development of legal principles as rules of practice made by barristers and judges for the guidance of lawyers practising in court has had the disadvantage that legal institutions were apt to be ignored if they did not easily lend themselves to litigation. The case law surrounding the collective agreement is negligible, for reasons to be mentioned presently collective agreements were rarely, if ever, taken into a court of law for interpretation, and it may perhaps be said that collective labour law is to-day in a position resembling

[1] For a survey of the role played by collective bargaining in Britain, see Richardson, *Industrial Relations in Great Britain*, 2nd ed., Geneva, 1938, pp. 100 *sqq*.

[2] For a large number of early examples: Webb, *Industrial Democracy*, 1926 ed., pp. 172 *sqq*., and see *Ministry of Labour Report on Collective Agreements between Employers and Workpeople in Great Britain and Northern Ireland*, vol. 1, 1934, pp. II and III.

[3] The principal works are: Raynaud, *Le Contrat Collectif de Travail*, Paris, 1901; Lotmar, *Der Arbeitsvertrag*, vol. 1, 1903; Sinzheimer, *Der korporative Arbeitsnormenvertrag*, 2 vol., 1907–8.

that of mercantile law in the days before Lord Holt.[4] But it looks very much as if the present war was going to be a turning point. War time legislation has given a new legal status to the collective agreement, and it is no longer possible, even for the most orthodox lawyer, to assert that the collective regulation of labour conditions is a matter outside the "law" which he can afford to ignore.

Contractual Function

It is, of course, true that the provisions of the Trade Union Act, 1871, are still apt to create the illusion that collective agreements are legally non-existent. Section 4 of the Act provides, *inter alia*, that: "Nothing in this Act shall enable any Court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely . . . (4) any agreement made between one trade union and another." An employers' association is a trade union in the eyes of the law.[5] Hence a collective agreement concluded between a workers' or an employees' union and an employers' association is struck at by the above quoted section 4 (4). But the limitations of the section have not always been sufficiently observed. Collective agreements between a single employer[6] or a number of single employers and a trade union are fully enforceable between the parties. Such agreements may not be as important to-day as they were in the past, but they do occur,[7] and are fully enforceable as contracts. This does not mean, of course, that the individual workman can derive any rights from the collective agreement, but it may mean that the trade union can obtain an injunction against the employer if he acts in defiance of the collective bargain.

Moreover, there are even collective agreements between employers' associations and workers' unions which are outside the terms of section 4 (4). The section says that "nothing in this Act" shall make such contracts enforceable.[8] It does not say that they are unenforceable *per se*. Only those which would have been unenforceable if the Act of 1871 had never been passed are not made enforceable *by the Act*. Now section 4 must be read in conjunction with section 3, which says: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust." From the point of view of the law of collective contracts this means that a collective bargain does not as such constitute an act in

[4] Holdsworth, *History of English Law*, vol. 5, pp. 130–131. During one of its most creative periods mercantile law was largely developed by non-lawyers. Malynes, whose *Consuetudo vel Lex Mercatoria* appeared in 1622, was a merchant, and Molloy, whose book appeared in 1676, had, according to Sir William Holdsworth, only "some claims to be called an English lawyer."

[5] See the definition in sect. 23 of the Act of 1871, as amended by sect. 16 of the Trade Union Act, 1876, and by sect. 1 of the Trade Union Act, 1913.

[6] So-called "shop agreements." See on this point Tillyard and Robson, "The Enforcement of the Collective Bargain in the United Kingdom," *Economic Journal*, vol. 48, 1938, p. 15. The present writer is much indebted to this article.

[7] They are gaining increasing importance with the growth of big monopolist undertakings. See, for example, the Agreement between Imperial Chemical Industries Limited and the Trades Unions concerned relative to Working Conditions of 20th December, 1937. The national agreements in railway transport also fall within this category.

[8] For cases see Slesser, *The Law Relating to Trade Unions*, 1921, pp. 166 *sqq.*

restraint of trade, even if, at common law, the contract would have come within that category. Even though the contract may be a restraint at common law, it is valid, but (section 4 (4)) nevertheless not "directly enforceable." A collective agreement which does *not* constitute a restraint *at common law* is valid at common law. It derives its validity from the common law, not from the Act, and, consequently, though there may be nothing "in this Act" to make it enforceable, it is enforceable at common law. The Act was passed seventy-one years ago, and, in the meantime, the law of restraint of trade has undergone an almost revolutionary development.[9] It is submitted that the words "restraint of trade" in the Act must be read in the light of this development. It is at least worthy of consideration whether there are not to-day large numbers of collective agreements between employers' associations and trade unions which are not in restraint of trade at common law, and, therefore, enforceable despite the Act.

Lastly, all that section 4 does is to prevent "direct" enforcement and recovery of damages for breach. It does not strike at the validity of the contract. Does it prevent an action for a declaration as to the contents of the agreement? Does it prevent an action for an injunction?[10] Can the compliance with the terms of the agreement serve as a defence against an action in tort, e.g. conspiracy? Would an inducement to break the collective agreement be a tort within the rule in *Lumley* v. *Gye*?[11] This is not the place to answer these questions, but they are, to say the least, arguable, and this shows that, after all, the collective agreement cannot be the legal "nothing" which it is sometimes considered to be.

However, all these are comparatively minor points. What is much more important, is, that a merely contractual analysis of the collective agreement leads to a distorted view of the whole institution, and makes one overlook a far more significant legal aspect of the matter which is not affected by the Trade Union Act, 1871. It is true, the collective agreement is a contract, a contract concluded between a trade union and either one or more employers or an employers' association. When concluding the collective agreement, a trade union or employers' association acts as principal, in its own name and for its own account. It does not act as an agent for its members, whether they are disclosed or not.[12] Or, to put it in a different way: the collective agreement, though a

[9] See, for example, *Osborne* v. *Amalgamated Society of Railway Servants*, [1911] 1 Ch. 540 (the second Osborne case), where the Court of Appeal examined the rules of the defendant trade union and held that it was not in restraint of trade, so that sect. 4 did not apply. See especially Fletcher Moulton, L.J., at p. 565.

[10] For the vast body of case law which deals with these two questions under sect. 4 (1) and (3), see Slesser, *l.c.* pp. 121 *sqq.*, where there is a good survey of the older material. There does not appear to be any case under sect. 4 (4). It would require a separate investigation to analyse the question to what extent and how the principles laid down in cases like *Yorkshire Miners' Association* v. *Howden*, [1905] A.C. 256, and *Amalgamated Society of Carpenters, etc.* v. *Braithwaite*, [1922] A.C. 440, can be applied to collective agreements.

[11] (1853) 2 E. and B. 216.

[12] *Holland* v. *London Society of Compositors and Another* (1924), 40 T.L.R. 440. This was a case of an agreement between two workers' trade unions, but the decision of Lush, J., must apply to collective agreements by parity of reasoning. It was held that the plaintiff, a member of one of the unions, "was a stranger and not a party to the contract." The learned judge rejected "the contention that the contract was made for any individual or for his behoof or benefit." It was "made by the trade unions concerned for their own purposes."

contract, can never be regarded as a contract of employment concluded by the trade union or employers' association on behalf of its members. The agreement lays down the conditions upon which future contracts of employment are to be concluded. The mutual obligations as between employer and workman always result from an individual contract, but the content of those obligations may be entirely fixed through the processes of collective bargaining.

The opposite view which was, at one time, in vogue on the Continent, is to-day universally rejected both on the Continent and in the United States. It would lead to almost insuperable difficulties and its acceptance would be at variance with the intentions of the parties. The trade union or employers' association wishes to lay down conditions of engagement and terms of employment for its present and for its future members and in very many cases for non-organised workers and employers as well. If it was acting as agent, its principals would include an unspecified number of future members, possibly persons not in existence at the time of the making of the contract such as companies subsequently formed, which is legally inadmissible under the rule in *Kelner* v. *Baxter*.[13] The trade union may have members who are infants[14]; if they were the principals of the bargain, difficulties regarding the validity of the contract would arise which are in themselves almost sufficient to demonstrate the artificiality of the construction. If, however, the members of collective parties[15] are not parties to the contract, they cannot derive any benefit under it. In legal systems which give effect to the *contractus in favorem tertii* this may be different, but in English law there is no legal construction which enables the members of a trade union or employers' association to derive any right under a collective bargain as a contract, either against the collective party on the other side or against its members.

It would seem then, as if a worker had no right to the "union rate," and as if an employer had no right at all to insist, as against his workers, upon compliance with the terms of the agreement - as regards working hours, liability to do piece work, overtime or otherwise.

Normative Function

No doubt this is perfectly true as far as the contractual aspect of the collective agreement is concerned, but the crux of the matter is that the collective bargain is something else, apart from being a contract. It is a *lex contractus*, or, rather, a *lex contractuum*, it is an attempt made by the parties to the contract to lay down law for those who employ workers and who work in the trade or industry. It is a body of autonomous norms made for the guidance of, and observation by, individual employers and workers. It is the anticipated fixation of the conditions under which they may enter into contracts of employment and of the terms of those contracts. The question is to what extent this attempt succeeds, or, in other words, to what extent the state gives effect, not to the freedom of contract between the parties to the collective agreement *inter se*, but to their legislative power. The collective agreement has two functions, a

[13] (1866) L.R. 2 C.P. 174.

[14] Above the age of sixteen. Trade Union Act, 1871, sect. 9.

[15] By this term we mean workers' unions and employers' associations, in contradistinction to individual employers. In a collective agreement the workers' side is always a collective party, the employers' side may or may not be.

contractual function and a normative function. It is the latter with which we are concerned.

Broadly speaking, those parts of the collective agreement which are destined to have a normative effect may be divided into two categories: conditions for engagement and terms of employment.

A condition for engagement is an agreement laying down under what circumstances certain categories of persons may be or must not be employed or seek employment for certain types of work. One example may stand for many: The National Agreement concluded between the Incorporated Federated Associations of Boot and Shoe Manufacturers of Great Britain and Ireland and the National Union of Boot and Shoe Operatives provides in section 9: "In the Clicking, Press, Lasting and Finishing departments, the proportion borne by the aggregate number of boys to the aggregate number of men employed throughout those departments, shall not exceed one boy to every four (or fractional part of four) men, . . ." Most of those "trade practices" which regulate apprenticeship or are directed against the dilution of labour and which are embodied in collective agreements, fall within this category.[16] So does a "closed shop" agreement. Statutory analogies to these autonomous regulations suggest themselves: restrictions of employment of women and children[17] and war time legislation affecting the engagement of workers[18] belong to the same legal category. However, while the statutory restrictions on employment are equipped with penal sanctions, there is no legal compulsion to observe the collective conditions of engagement with which we are concerned. It would be fantastic to assume—and there is no rule of law warranting the assumption—that a contract of employment concluded in defiance of a collective condition of engagement was lacking in legal validity. An employer who is party to a shop agreement may be guilty of a breach of a collective contract and may make himself liable to the trade union on the other side if he violates the collective agreement by employing men in spite of a collective prohibition, but as a party to the contract of employment he is not affected. Where an employers' association is a party to the collective agreement, a violation of a condition of engagement by a member will only involve the association in liability for breach if it failed in its contractual duty to bring to bear upon its recalcitrant member all the pressure at its disposal in the direction of compliance with the collective bargain, provided, of course, that the agreement is enforceable at all. An effective sanction cannot be found in

[16] The Restoration of Pre-War Trade Practices Act, 1942, defines in sect. 11 a "trade practice." "Trade practice, in relation to an undertaking or branch of an undertaking, means any rule, practice or custom (whether obtaining by virtue of contracts of employment or otherwise) observed in the undertaking or branch *with respect to the class or classes of persons to be employed or not to be employed therein*, or *with respect to the conditions of employment, hours of work or working conditions of the persons or any class of the persons so employed.*" (Italics throughout this paper are the present writer's.) This clearly embodies the distinction made in the text between conditions of engagement and terms of employment. A trade practice may or may not be incorporated in a collective agreement. The definition in the Act is clearer than that in Art. 7 of the Conditions of Employment and National Arbitration Order, 1940, but there does not seem to be any substantial difference.

[17] E.g. Factories Act, 1937, sects. 20, 21, 56, 57, 58, 59. Employment of Women, Young Persons and Children Act, 1920. Coal Mines Act, 1911, sect. 91.

[18] E.g. Undertakings (Restriction on Engagement) Order, S.R. & O. 1941, 2069.

the law. It must be found in the social pressure which the trade union is capable of exercising upon the employers.

The situation is entirely different with regard to terms of employment. Examples of such terms are provided by all those collective rules which regulate wages, piece rates, sliding scales, allowances, hours of labour, overtime, holidays, etc.[19] The difference between these provisions and the conditions of engagement is that the former are, and the latter are not, capable of being incorporated in the contract of employment itself. Consequently terms of employment can, but conditions of engagement cannot, become usages which, like commercial customs in mercantile law, become the *lex contractus* for individual contracts as long as they have not been expressly contracted out. The collective agreement is the embodiment of a custom, pre-determining the content of contracts of employment, unless contradicted by the express terms of those contracts. It is a "standard contract," or, to use the more expressive French term, a *contrat d'adhésion*, the special feature of which it is that the standard is set up not for the contracting parties themselves, but—except in the case of the shop agreement—for their members and possibly for outsiders. Unlike commercial model contracts laid down by chambers of commerce and similar institutions, Institute Clauses in the law of insurance, or the well-known forms of model charter parties, etc., it becomes part of the contracts by tacit, not by express incorporation[20]—much like the Standard Terms and Conditions of Carriage by Railway. But, while the latter have been laid down by the Railway Rates Tribunal, a statutory body, the collective conditions of employment owe their origin to a contract. They substitute for the unilateral standard set up by the employer the collective contractual standard agreed upon between an employer, or an employers' association, and a trade union. They try to convert formal into factual freedom of contract as between employer and workman, by raising the latter to a level of equality of bargaining power.[21]

This social function of the collective agreement must be taken into account when determining the extent and character of its normative effect. Unless there is a special provision in the agreement itself, most of the terms of employment which it contains are minimum regulations for the benefit of the workers. This is certainly true of the clauses regulating wages, overtime pay, allowances, holidays, etc., though not necessarily of those dealing with hours of work and overtime work. In a shop agreement the employer undertakes towards the trade union to pay his men not less than the wages, etc., laid down in the agreement. Where an association of employers is a party to the agreement, it undertakes to induce its members not to derogate, by individual contracts of employment, from the collective terms to the detriment of the workers. The trade union, in turn, undertakes not to resort to collective hostile action for the time

[19] For a summary of numerous examples taken from the Mining and Quarrying Industry, Engineering, Shipbuilding, Iron and Steel and other Metal Industries, and from the Building, Woodworking and Allied Industry, see the elaborate Introduction to the *Ministry of Labour Report* of 1934, quoted above, note 2.

[20] For a very interesting early recognition of this custom, see the decisions of Watson, B., and the Exchequer Chamber, in *Hill* v. *Levey* (1858), 3 H. and N. 7, 702. For other examples of similar methods of standardisation, see Prausnitz, *Standardisation of Commercial Contracts*, pp. 22–24.

[21] See the classical description of the "Method of Collective Bargaining" in Webb's *Industrial Democracy*, Part II, chapter II.

of the currency of the agreement with the object of enforcing better conditions. If these propositions are correct, it follows that the usage established by the collective agreement is a minimum usage—to the effect that, in the absence of an express agreement to the contrary, the wages to be paid are not to be lower than those fixed in the collective bargain, the holidays not to be shorter, etc.

Very difficult questions of detail arise from the application of these principles, but they cannot be discussed here. One of these difficulties, however, must be mentioned, because it goes to the root of the matter, and has a bearing on the war time legislation to be discussed below. What is the scope of the usage? Does it extend to non-organised workers, to employers outside the contracting association? This is not a question which can be solved in the abstract. Its solution may vary from industry to industry, from district to district, possibly even from workshop to workshop. It may be argued that since neither a workers' union nor an employers' association has any power over non-members, it cannot undertake to keep them to the bargain or to prevent them from collective hostile action (strike, lockout). Yet, as far as the workers' side is concerned, it is often the intention of the collective parties to lay down a usage for the benefit of outsiders as well as for members, and in many cases it will be found that on both sides there is at least an inclination to extend the usage to the factories, offices, etc., of non-organised employers. The more "representative" the organisations are of "substantial proportions of the employers and workers engaged in that trade or industry in that district,"[22] the greater is the likelihood that they intended to establish a usage for outsiders. A fuller analysis of this question would require a close study of British trade unionism and of the attitude, both of workers' and employers' organisations, towards unorganised labour and employers.[23]

The usage created by collective agreement can be contracted out by express provision in the contract of employment. The State would have to intervene by legislation or subordinate legislation in order to restrict the freedom of contract of the individual employers and workmen, or to allow it to be so restricted by *res inter alios acta*, namely by the agreement between the two organisations. In the case of the shop agreement the validity of an express bargain between employer and workman by which the latter undertakes to work under conditions less favourable than those contained in the agreement, is quite beyond doubt, if the workman is ignorant of the existence of the relevant terms of the collective agreement. However, if the workman knows, that he is contracting in defiance of the collective terms agreed upon by his employer, the contract of employment is possibly void for being a "contract to break a contract."[23a]

[22] See sect. 2 (4) of the Industrial Courts Act, 1919, and Art. 5 (1) of the Conditions of Employment and National Arbitration Order, 1940.

[23] See the interesting observations in the *Report of the Labour Department of the Board of Trade on Collective Agreements*, 1910, p. XIII, quoted in Milne-Bailey, *Trade Union Documents*, 1929, p. 227. For details and further material, Webb, *Industrial Democracy*, pp. 209 to 212. In 1937 the Mayor's and City of London Court declared the limitation of contractual rights to union members to be "unreasonable," and allowed an unorganised stevedore to rely on the usage by which union members shared certain extra moneys pooled between them which had been paid by the employer. *Hooker* v. *Lange, Bell & Co., Ltd.* (1937), 4 L.J.N.C.C.R. 199; see also *International Survey of Legal Decisions on Labour Law*, 1937/1938, p. 4.

[23a] Lauterpacht, Contracts to Break a Contract (1936), 52 L.Q.R. 457.

The invalidity would presumably only affect those terms which are in violation of the collective bargain.

Compulsory Normative Effect

English law did not, until recently, contain any general provision by which compulsory effect was given to the terms of collective agreements. It is tempting to speculate upon the causes of the absence of such provisions. The craving for state support is not one of the characteristics of a strong trade union movement. Where the social sanction is effective, the legal sanction can easily be dispensed with, and the picket is undoubtedly a more powerful agent of trade union action than the bailiff. Trade union officials who know that employers will in their own interest keep to the terms of the collective bargain, are not likely to invoke the aid of the law in order to prevent contracting out. Where the proportion of organised workers is high, and the danger of undercutting by unorganised labour small, trade union opinion will not be favourably disposed towards a forcible extension of the benefit of collective agreements to outsiders. It is in the badly organised industries that the question of legal enforceability of collective agreements is most acute. Here, however, legislation passed since 1909 has taken the sting out of the tail of the problem. The Trade Boards Acts of 1909 and 1918, the Agricultural Wages (Regulation) Act of 1924 (amended in 1940), and the Road Haulage Wages Act, 1938, provide for the fixing of wages, and, under the Holidays with Pay Act, 1938, also of holidays, by administrative, i.e. statutory wage regulating, authorities. These enactments cover a large section of the less well organised industries.[24] Trade unions and employers' associations participate in the practical operation of trade boards,[25] agricultural wages committees,[26] road haulage area wages boards,[27] the Agricultural Wages Board,[26] and the Road Haulage Central Wages Board.[27] Their co-operation results, insofar as these Acts apply, not in a contract but in an administrative order[27a] which is binding, and equipped with civil and penal sanctions. In these industries, then—although there may be a contractual superstructure over and above the minimum basis established by administrative act—the legally enforceable collective contract is, up to a point, unnecessary because its place has been taken by direct state intervention. And in the well-organised industries the pressure for legal enforceability has been comparatively small, although on numerous occasions Bills for the regulation of the legal effect of collective agreements have been before Parliament. It is not suggested that it is only the legal structure

[24] In the coal-mining industry, which can certainly not be regarded as one of those which are "less well organised," the acerbity of the conflict of capital and labour has produced minimum wage legislation: The Coal Mines (Minimum Wage) Act, 1912, which entrusts the fixing of wages to joint district boards composed of an equal number of employers and workmen and an independent chairman, to be recognised by the Board of Trade (now the Ministry of Labour). Although the Act seems to have lost its practical importance—see Tillyard, *Industrial Law*, 2nd ed., 1928, p. 67—its provisions are still of great interest as a pattern of wage legislation.

[25] Trade Boards Act, 1909, sect. 11.

[26] Agricultural Wages (Regulation) Act, 1924, First Schedule, Art. 1, Art. 7.

[27] Road Haulage Wages Act, 1938, First Schedule, Art. 1, Art. 2.

[27a] We are using this comprehensive term to connote the various acts of delegated legislation emanating from trade boards and other wage-regulating authorities entrusted with the power of compulsory regulation of conditions of employment.

of British industrial relations which is responsible for the non-existence of rules making collective contracts binding upon employers and workmen. A full explanation of this phenomenon can only be found in the economic and social structure of Britain, and in the fact that the acerbity of the conflict between capital and labour decreased, and the recognition of trade unions became common, in many British industries during the period which, in other countries like France, Germany, and the United States, saw the growth of a system of collective labour law. The British preference for purely voluntary institutions may also be one of the contributing factors, and, last but not least, the growth of permanent joint negotiation and arbitration machinery in many British industries, with which must be contrasted the complete lack of special courts which could be safely entrusted with the administration of laws of this kind.[28]

The question, then, whether and to what extent the State should give legal sanction to the code of employment laid down by voluntary industrial agreements, is a political problem of the first magnitude. There prevails a certain amount of confusion with regard to the legal aspect of this problem, and it is advisable to bear in mind the difference between three possible forms of state intervention, only two of which are germane to the subject of this paper.

1. *Compulsory Arbitration.* This means that the state intervenes between the trade union and a single employer or an employers' association.[29] The state tries to bring about a collective agreement by mediation, and, if this fails, pronounces an award which constitutes a compulsory collective agreement, or at least compulsory collective rules, between the parties. The law may provide that the parties are, in this case, placed as if they had made a voluntary agreement. In practice compulsory arbitration will, more often than not, be combined with rules of law which make the terms of the award binding upon the individual employers and workers, but this need not be the case. Compulsory arbitration as such merely regulates the machinery of the conclusion of the agreement or the way in which collective terms come into being, it has nothing to do with their legal effect. If nothing except the principle of compulsory arbitration had been introduced during the present war, the terms of the compulsory awards would have been capable of being contracted out by contracts of employment. The Conciliation Act, 1896, and the Industrial Courts Act, 1919, reject the principle of compulsory arbitration. It existed during the last war under the Munitions of War Act, 1915, and in a modified form it reappears in the Conditions of Employment and National Arbitration Order, 1940. It is, from the point of view of employers as well as workers, an undesirable institution, and one may be permitted to express the hope that it will disappear after the end of

[28] Sect. 2 (2) of the Coal Mines (Minimum Wage) Act, 1912, seems to take it for granted that the administration of the minimum wage rules must not be left to the courts. It says that the "district rules" must "make provision with respect to the persons by whom and the mode in which" certain vital questions are to be decided, e.g. whether a particular workman comes within the scope of the minimum wage rates, whether he has complied with the conditions for earning the minimum wage, and whether he has forfeited his right to earn it.

[29] This is the modern meaning of the term. Compulsory arbitration as between employer and workman individually has played its part in English social and legal history: see e.g. the Cotton Arbitration Act, 1800, 39/40 Geo. III, c. 90. And see for the Whitefield case, in which the difference between collective and individual compulsory arbitration became a major political issue: Lord Amulree, *Industrial Arbitration in Great Britain*, pp. 31–33, 43–45.

hostilities.[30] This article, however, deals with the legal effect of collective agreements, not with their conclusion. There are two different ways in which the state can give compulsory effect to collective terms. Both can be combined.

2. *Compulsory Effect of Collective Terms as between Members of Contracting Parties.* This means: An employer who is either himself a party to a collective agreement or a member of an association which is party to an agreement cannot validly make a contract of employment by which he purports to derogate from its terms, provided the worker is a member of a contracting union. Conditions in the contract of employment which are less favourable to the worker than those of the collective agreement are automatically pushed aside and replaced by the latter. The collective terms are part of the contract concluded between the members of associations on either side. This civil sanction of the terms of employment may[31] or may not be coupled with a penal sanction making it a criminal offence for an employer to attempt to grant to a worker terms less favourable than those laid down in the collective agreement. The penal sanction —and only the penal sanction—can also be used for the enforcement of conditions of engagement as distinguished from terms of employment. Thus, an Act of Parliament might conceivably make it a criminal offence for an employer to employ women or boys in excess of the maximum number laid down in a collective agreement, so, however, that the validity of the contracts of employment is not impaired. Whether this is desirable is another matter.

Existing labour legislation provides numerous parallel examples of legislative and administrative regulations of terms of employment which operate as part of the contract of employment itself. It is a moot point whether the claims arising from Workmen's Compensation Acts must not be classified as contractual rather than tortious, a question much discussed in the United States in connection with inter-State conflicts of law.[32] But it is clear beyond doubt that a minimum wage rate fixed by a trade board and confirmed by the Minister of Labour, becomes "effective," i.e. becomes part of the contract of employment.[33] The employer who has paid less than the statutory wage is civilly liable to pay the difference for the two years preceding the summons, and he is also criminally liable. Much the same applies to a minimum rate of wages fixed by a joint district committee in the coal mining industry,[34] by an agricultural wages committee and made effective by the Agricultural Wages

[30] Advocates of compulsory arbitration should be invited to read and ponder over the lucid analysis in Webb, *Industrial Democracy*, pp. 244–5. The present writer attempted to demonstrate the disastrous consequences of compulsory arbitration in Germany in his book *Das Soziale Ideal des Reichsarbeitsgerichts*, 1931, and in an article "Der Funktionswandel des Arbeitsrechts," *Archiv fur Sozialwissenschaft*, 1932, p. 146. It is still his conviction that compulsory arbitration is incompatible with voluntary trade unionism, and that it has a close affinity to Fascist legal institutions. It is most dangerous if, as under the law of the Weimar Republic, it is coupled with the full contractual enforceability of the collective agreement.

[31] For early examples of combinations of civil and penal sanctions, especially under the Statute of 1603, 1 Jac. 1, c. 6, with the object of enforcing wages fixed by justices, see Amulree, *l.c.* pp. 4–5. Compare also the Spitalfields Weavers Act (1773), 13 Geo. III, c. 68.

[32] Stumberg, *Conflict of Laws*, p. 189.

[33] Trade Boards Act, 1909, s. 6, as amended by the Trade Boards Act, 1918, and sect. 9 of the latter Act.

[34] Coal Mines (Minimum Wage) Act, 1912, sect. 1.

Board,[35] to the "statutory remuneration" fixed by the Minister of Labour by a "road haulage wages order,"[36] or by the Industrial Court upon a reference under section 5 of the Road Haulage Wages Act,[37] and to a direction that a worker shall be allowed holidays, made under the Holidays with Pay Act, 1938,[38] by a wage regulating authority, i.e. by a trade board, an agricultural wages board, or the Road Haulage Central Wages Board. In *Gutsell* v. *Reeves*,[39] the Court of Appeal held that, for the purposes of the application of the Statute of Limitations, a claim made under the Agricultural Wages (Regulation) Act for the difference between the statutory minimum wage and the contractual wage was a claim upon the contract and not a claim upon the statute. "The only effect of the statute on that contract is to insert, against, it may be, the overt agreement of the parties, the proper rate of wages" (*per* Lord Wright, M.R.).[40] It is precisely this effect of the collective agreement with which we are concerned.

3. *Extension of the Effect of Collective Terms to Outsiders.* The collective terms may be given compulsory force in relation to unorganised workers and to contracts of employment concluded between an employer who is not a member of a contracting organisation and his workers, organised or not. It may be very desirable, from the trade union's point of view, to have this extended effect of the collective agreement in order to prevent undercutting, although it involves the inevitable consequence that the non-unionist is enabled to reap part of the fruit sown by his organised fellow workers. It may be even more desirable from the employer's point of view in that it enhances the effectiveness of the collective bargain as a cartel between the employers in relation to a more or less substantial part of their costs of production. It is theoretically possible, but, at least in peace time, hardly practical politics, to allow the collective agreement to have this extended effect automatically.[41] In practice, legislation of this kind will usually require an express declaration by an organ of the state, e.g. the Minister of Labour or one of his subordinates, in order to give this extended effect to the collective agreement.

Compulsory Normative Effect under Peace Time Legislation

Between the two world wars English law made two tentative approaches towards a positive solution of the question whether collective agreements should have a compulsory normative effect.

The first was the short-lived section 2 of the Coal Mines Act, 1931,[42] which was in operation for only one year. This provision gave normative effect to "the minimum percentage additions to basis rates of wages"

[35] Agricultural Wages (Regulation) Act, 1924, sects. 3, 7.

[36] Road Haulage Wages Act, 1938, sects. 3, 6, 7.

[37] See the clear formulation in sect. 6 (1) of the Act: "If the contract between the employer and the worker provides for the payment of less remuneration in respect of that work, it shall have effect as respects the said period as if for that less remuneration there were substituted the statutory remuneration clear of all deductions."

[38] Sect. 2.

[39] [1936] 1 K.B. 272.

[40] Contrast the decision of the Privy Council in *True* v. *Amalgamated Collieries of Western Australia, Limited*, [1940] A.C. 537, and see for further discussion a note by the present writer in MODERN LAW REVIEW, vol. 4, p. 225.

[41] See, however, below, p. 131.

[42] 21–22 Geo. 5, c. 27.

and to "the subsistence wage rates" which were in force in the various "districts" of the coal-mining industry on the "appointed day." It was to be a "term of the contract for the employment of every workman whose wages are determined by reference thereto that the wages of that workman shall be calculated accordingly." The appointed day was the first day on which, in any district, wages were in fact regulated on the basis of a seven-and-a-half hour shift below ground, and the terms "district," "minimum percentage additions," and "subsistence wage additions" were defined by what was in fact a reference to existing or former collective agreements the terms of which were thus incorporated in the statute. A proviso safeguarded, "save as herein expressly provided," "the operation of any agreement entered into or custom existing before the commencement of this Act," a clause which seems to enable existing, but not future collective agreements, to allow deviations from the collective norm in individual cases.

This was the first enactment which gave compulsory normative effect to collective agreements, but the second enactment is much more significant. This is the Cotton Manufacturing Industry (Temporary Provisions) Act, 1934,[43] a most interesting experiment in the field of labour legislation. Certain collective agreements governing the remuneration of workers in the cotton weaving industry of Lancashire, Derbyshire, Cheshire and the West Riding of Yorkshire can, upon joint application by representative organisations of employers and workers, and upon a unanimous recommendation by an independent board, be "brought into force" by the Minister of Labour. The Minister's order has a dual effect: (1) It becomes a criminal offence for the employer to pay less than the collective wage to any person employed in the industry to whom the order applies. (2) It becomes "a term of the contract between every person employed in the industry as respects whom a rate of wages is provided for by the order and his employer that the employer shall pay to the person employed wages at a rate not less than the rate applicable in his case under the order." It will be noticed that the Act combines the two civil sanctions which we have tried to distinguish. It gives compulsory normative force to the collective terms of remuneration as between the members of the contracting organisations—and it extends this effect to outsiders. The social emphasis is undoubtedly on the second effect—the prevention of undercutting and the protection of employers against unfair competition by underpayment. But the compulsory effect as regards the members themselves is not without significance. It is true that the Minister can not make his order unless the employers' association and the trade union agree to apply for it, and that the Minister must revoke his order if one of the two organisations makes a request to this effect. However, even though the two organisations may agree that the collective terms should be given legally binding effect upon their members, that may not necessarily be the view of all the members themselves, and, while the extension effect protects both organised employers and organised workers against price and wage cutting from outside, the compulsory effect upon the members themselves strengthens the hands of both organisations in their internal relationship with their members. It should also be observed that neither effect is created by the agreement as such, but that in both respects the Minister's order must be interposed, although it can never modify

[43] For a discussion, see the article by Tillyard and Robson, mentioned above, note 6.

the terms of the agreement. This feature distinguishes the Act from certain continental legislative schemes under which members are automatically bound by collective agreements, but outsiders only through an intervening act of delegated legislation.

It is not possible to deal with certain other interesting features of the Act, which can be regarded as an early harbinger of legislative schemes which matured during the present war.

Apart from the normative method there are many other, but indirect, ways in which the state can try to give effect to collective agreements. The most prominent measure of this kind is, of course, the Fair Wages Clause[44] laid down by Parliament for Government contracts. Its observance is also a condition of every road service licence granted to the owner of a public service vehicle who uses it for hire or reward at separate fares,[45] and of every licence granted to the owner of a goods vehicle for the carriage of goods for hire or reward.[46] Other examples are numerous.[47] Most of them arise from circumstances in which the employer is somehow dependent on governmental action. The granting of Government contracts, of licences, of subsidies, is made contingent upon the compliance with collective terms of employment. But in none of these cases are the terms directly enforceable between employer and worker.

We have suggested that English law has so far rejected the general compulsory effect of collective agreements because the strength of the trade unions made it unnecessary. What is that "social sanction" which has thus prevented the intrusion of the state into one of the most important spheres of the life of the community? It is the *ultima ratio* of the labour dispute. No doubt the psychological reason why the criminal law is observed is not primarily the fear of punishment, nor is the fear of strikes and lockouts necessarily the dominating motive which prompts employers and workers to obey the collective terms. But just as in the field of criminal law there looms in the background the fear of imprisonment and fine as a superadded motive inducing lawful conduct in marginal cases, so in industrial relations it is the sense of moral obligation, the fear of friction and dislocation, and it is the possibility of labour disputes rather than their actual frequency which supplies a social motive supporting the observance of collective terms even where the individual regards them as economically disadvantageous. In international relations, even among peacefully-minded states, disarmament, i.e. the disappearance of the *ultima ratio*, has proved utopian in the absence of legal sanctions which can take the place of self-help.[48] In the same way the legal sanction must come into its own between employers and workmen, as soon as for higher reasons the weapon of the strike and the lockout is taken out of their hands. This is what happened in this country in 1940.

[44] For its wording, see Milne-Bailey, *Trade Union Documents*, p. 382, and for a discussion see Tillyard and Robson, *l.c.* pp. 17, 18.

[45] Road Traffic Act, 1930, sect. 93. Road and Rail Traffic Act, 1933, sect. 32.

[46] Road and Rail Traffic Act, 1933, sect. 8 (2).

[47] E.g. Railways Act, 1921, Part IV, and Schedule 7. For other examples, see the article by Tillyard and Robson. War-time legislation also provides instances, e.g. sect. 2 of the Control of Employment Act, 1939, and Art. 3 of the Undertakings (Restriction on Engagement) Order, 1941, S.R. & O. 2069.

[48] The inherent connection between the Elizabethan and Jacobean wage legislation and the earlier Combination Acts offers an obvious example of the same phenomenon.

II. The Conditions of Employment and National Arbitration Order

Less than a fortnight after the formation of the Churchill Government and while the German Army was invading Holland, Belgium and France, Parliament passed the Emergency Powers (Defence) Act, 1940. It enlarged the wide powers conferred upon the Executive by the Emergency Powers (Defence) Act, 1939, and enabled His Majesty "by Order in Council to make such Defence Regulations making provision for requiring persons to place themselves, their services, and their property at the disposal of His Majesty, as appear to him to be necessary or expedient for securing the public safety, the defence of the Realm, the maintenance of public order, or the efficient prosecution of any war in which His Majesty may be engaged or for maintaining supplies or services essential to the life of the community."

This Act which, without exaggeration, may be called one of the most far-reaching measures ever taken by the British Parliament, came into force on May 22, 1940. On the same day an Order in Council added a number of new provisions to the existing code of Defence Regulations, among them Defence (General) Regulation 58A.[49] This enabled the Minister of Labour and National Service to requisition labour services, to regulate the engagement of workers by employers and the duration and situation of their employment, and to order industrial registration. The vast body of war time law governing the regulation of the labour market is based on this Defence Regulation.[50] But, if the Minister of Labour was to control the supply of labour and the direction of the country's man- and woman-power into the proper channels so as to lay the foundations for total warfare and maximum production of implements of war, measures had to be taken "with a view to preventing work being interrupted by trade disputes." Theoretically, the Minister might have achieved this object by exercising his power of requisitioning the services of the workers involved in the dispute—but it is hardly necessary to point out that this would have been totally impracticable, and that it would have meant a disruption of the trade unions which could not have been but disastrous for the war effort. If he was to prevent the interruption of work by trade disputes, the Minister had to be given the power of removing their causes, and of settling conflicts which were threatening to lead to a stoppage of work. In order to enable the Minister to achieve this object, an Order in Council[51] added a further Defence Regulation 58AA, which came into force on July 7, 1940. This gave the Minister the power, *inter alia*, to establish a tribunal for the settlement of trade disputes and to regulate its procedure, to prohibit strikes and lockouts, to require employers "to observe such terms and conditions of employment as may be determined in accordance with the order to be, or to be not less favourable than, the recognised terms and conditions," to record departures from trade practices, and to make provisions for incidental and supplementary matters.

It was by virtue of this Defence Regulation that, on July 18, 1940,

[49] S.R. & O., 1940, 781, amended: S.R. & O., 1940, 828 and 907, S.R. & O., 1941, 257, 1899, and 2052.

[50] It was extended on 28th February, 1941 (S.R. & O., 1941, 257) by an additional Order in Council which is the basis of the Essential Works Orders.

[51] S.R. & O., 1940, 1217.

the Minister of Labour and National Service made the Conditions of Employment and National Arbitration Order.[52]

Settlement of Trade Disputes

The Order was made "with a view to preventing work being interrupted by trade disputes."[53] Nothing can be more urgent in times of total warfare than to secure steady and unhampered production, and no doubt this object might have been achieved by a sweeping and wholesale prohibition of collective labour action. But even in the dire peril of the summer of 1940 Mr. Bevin did not feel compelled or inclined to do what Mussolini had done openly and what Hitler had done surreptitiously in the days of peace: to suppress all strikes and lockouts. The prohibition in Art. 4 of the Order is conditional, not absolute. "An employer shall not declare or take part in a lockout and a worker shall not take part in a strike in

[52] S.R. & O., 1940, 1305 (in the text henceforth referred to as "the Order"). On 14th November, 1941, the Order was amended by the Conditions of Employment and National Arbitration (Amendment) Order, S.R. & O., 1941, 1884, which altered the constitution of the Tribunal by making it incumbent upon the Minister to choose not only the members representing the employers and workers, but also the appointed members from a panel of not more than five persons.

[53] The definition of a trade dispute in Art. 7 is, in accordance with subrule (4) of the enabling Regulation 58AA, taken from sect. 8 of the Industrial Courts Act, 1919. "Trade dispute means any dispute or difference between employers and workmen, or between workmen and workmen, connected with the employment or non-employment, or with the conditions of labour of any person." Thus, neither a strike nor a lock-out is itself a trade dispute. The latter may, but need not, lead to hostile action, while strikes or lockouts may or may not occur in connection with trade disputes. In *R.* v. *National Arbitration Tribunal, Ex parte Bolton Corporation*, (1941) 1 All E.R. 413 (King's Bench Division), (1941) 2 All E.R. 800 (Court of Appeal), (1942) 2 All E.R. 425 (House of Lords: *sub nomine: National Association of Local Government Officers* v. *Bolton Corporation*), the House of Lords disapproved of the view, taken by Bennett, J., in the Court of Appeal, that there could not be a trade dispute in the absence of a threat or suggestion of a strike or lockout. The contention that the powers conferred by the Order could only be exercised in the presence of a threatened stoppage was abandoned before the House of Lords (*per* Viscount Simon, L.C., at p. 428 A). It is true that, from the point of view of legislative policy, the power to refer trade disputes to compulsory arbitration and the binding force given to agreements, decisions and awards by Art. 2, are the corollary to the conditional prohibition of hostile action in Art. 4. But, legally speaking, the two matters are quite distinct. A trade dispute *must* be reported before hostile action can be started, but it *may* be reported even where there is no question of any hostile action at all. The Minister's power to interfere in a trade dispute is defined in Art. 2, without any reference to the danger of a strike or lockout, and this is clearly covered by Regulation 58AA.

The *Bolton* case arose from the reference by the Minister to the N.A.T. of a dispute between the National Association of Local Government Officers and the Bolton Corporation about the payment by the Corporation to its officers serving in the Forces of the difference between their contractual remuneration and their service pay. Reversing the decision of the Court of Appeal (MacKinnon, Du Parcq, L.JJ.), and Bennett, J., and restoring that of the King's Bench Division (Viscount Caldecote, L.C.J., and Tucker, J., Atkinson, J., dissenting), the House of Lords refused to issue an order of prohibition directing the Tribunal not to adjudicate upon the dispute. Their Lordships held (1) that the dispute between the Corporation and the trade union was a "trade dispute," and (2) that it was *intra vires* the N.A.T. to impose upon a local authority an award which directed them how to exercise their discretionary power (based upon the Local Government Staffs (War Service) Act, 1939) to pay to their officers the difference between their salaries and their service payments. With the latter point, which is in itself of great interest, the present paper is not concerned.

connection with any trade dispute unless the dispute has been reported to the Minister in accordance with Article 2 of this Order and twenty-one days have elapsed since the date of the report and the dispute has not during that time been referred by the Minister for settlement in accordance with the provisions of that Article."

Although the present paper is intended to deal with collective agreements and not with the law governing trade disputes, it is useful to dwell for a moment on Art. 4 of the Order. It fulfils various functions: To start with, it is a "cooling off" clause reminiscent of Article 15 of the Covenant of the League of Nations and also of the international treaties sponsored by Secretary of State Bryan at the beginning of the first Wilson administration.[54] The hostile parties are compelled to ponder over their grievances for three weeks—so as to gain time for conciliation and to allow the emotional ardour to evaporate. But that is only a minor effect. The main point is that the participation in hostile action becomes a criminal offence[55] only if the Minister of Labour decides that the trade dispute is sufficiently important for him to intervene. Clearly the conditional suppression of strikes and lockouts does not constitute an end in itself, but a means serving two purposes: the furtherance of national production and, though this may not have been within the contemplation of those who drafted the Order, the general control of basic labour conditions by the Minister.[55a]

What are the steps which the Minister can take in order to prevent a strike or lockout in connection with a trade dispute the existence or imminence of which has been reported to him[56] by either party to the dispute?[57] Article 2 (2) to (4) opens up three possibilities. In the first place there may be in existence a collective agreement (to which an

[54] Oppenheim—Lauterpacht, *International Law*, 5th ed., vol. 2, pp. 15, 90–91, and see for a description of the Bryan treaties, E. H. Carr, *The Twenty Years' Crisis*, p. 43.

[55] Under Defence (General) Regulation 92, which lays down the penal sanction for contravention of, or failure to comply with, any Defence Regulation, or any Order, rule or bye-law, made under a Defence Regulation, or any direction given or requirement imposed either under any Defence Regulation or under any order, rule or bye-law made under it.

[55a] The Order was made in accordance with the unanimous recommendation of the Joint Consultative Committee representing the British Employers' Confederation and the Trades Union Congress. See Price, *Labour in the War*, pp. 140, 141. The object of these recommendations was clearly the prevention of stoppages and preservation of existing negotiation machineries. It does not seem that the control of conditions of employment was envisaged at that time as one of the aims of the Order. In practice, however, this has turned out to be one of its effects.

[56] We are only dealing with reported disputes, but it seems that Art. 3 gives the Minister the power to act on his own initiative even where neither party to the dispute has reported to him. However, this provision enables the Minister only to refer the matter to the N.A.T. for advice.

[57] Both organisations and individuals can be parties to a dispute. This follows from the definition of a trade dispute in Art. 7. In the *Bolton* case, Bennett, J., expressed the view (at p. 114 of the decision of the Court of Appeal) that a difference between a trade union and an individual employer was not a trade dispute. But this was emphatically rejected by the House of Lords. "It would be strangely out of date to hold, as was argued, that a trade union cannot act on behalf of its members in a trade dispute, or that a difference between a trade union, acting for its members, and their employer, cannot be a trade dispute" (*per* Lord Wright, at p. 435 E). Art. 2 (1) makes it clear that individuals as well as organisations, acting on behalf of their members, can report a dispute to the Minister.

organisation is a party on the employers' as well as on the workers' side)[58] providing for "means for settling the dispute," i.e. for machinery for either conciliation or arbitration or both. If so, the Minister *must* "refer the matter for settlement in accordance with those provisions." Consequently the whole procedure before the National Arbitration Tribunal to be mentioned below is subsidiary to the voluntary institutions established by collective agreement, no matter whether they were set up before or after the coming into force of the Order.[58a] This is another and very remarkable instance of the "indirect" recognition of collective agreements by the State. It is only if the negotiations for a voluntary settlement fail or are unduly delayed that the Minister may refer the matter to the National Arbitration Tribunal (N.A.T.). Indeed, it is clear from Art. 2 (4) that in this contingency he must do so.[59]

In the absence of a collective agreement of this kind, the Minister has two courses open to him. He must either take what the Order calls "any steps which seem to him suitable to promote a settlement of the dispute," e.g. appoint an *ad hoc* board or intervene directly or through a subordinate officer, or he may refer the matter for settlement to the N.A.T. If, in the first alternative, the "steps" do not lead to a prompt settlement (and as a rule "prompt" means within three weeks from the report of the dispute) the matter must be taken before the N.A.T. (Art. 2 (3) and (4)). The N.A.T. consists of three appointed members and one workers' and one employers' representative, all of them selected from panels. The employers' and workers' panels are constituted after consultation with the British Employers' Confederation and the Trades Union Congress (Schedules Nos. 1 and 2, and Amendment Order, 1941). The chairman is a learned judge.[60]

Since the N.A.T. must, as a rule (Schedule No. 6 (1)) pronounce an award within 14 days from the reference if practicable, a trade dispute which has been referred for settlement must ultimately lead either to an agreement or to a decision or an award which may be the result of a "step" taken by the Minister or of voluntary conciliation or arbitration, or of the proceedings before the N.A.T. The hostile parties must abide by the award because, let it be remembered, it is a criminal offence to take part in a lockout or in a strike in connection with a trade dispute not only if a report to the Minister has been omitted, or less than three weeks have elapsed since the report, but also if the Minister has referred

[58] Art. 2 (2) clearly excludes agreements concluded by one or more employers individually. The scheme of the Order is closely related to that of sect. 2 of the Industrial Courts Act, 1919—see particularly, sect. 2 (4).

[58a] The existence of the Order and of the N.A.T. have led to a strengthening of the existing systems of voluntary negotiation. New conciliation bodies have been set up, in order to prevent disputes from being taken before the N.A.T. See Price, *l.c.*, p. 143. This is another example of the well-known phenomenon that voluntary collective bargaining may be stimulated by State interference.

[59] Where steps to promote a settlement, taken by the Minister under Art. 2 (2), have not resulted in a prompt settlement of the dispute, the Minister *must*, in view of Art. 2 (4) "refer the dispute for settlement to the N.A.T. . . . within 21 days from the date on which the dispute was . . . reported . . . , unless, in his opinion, the special circumstances of the case make it necessary or desirable to postpone such a reference." Despite the wording of Art. 2 (2) the Minister *must* refer the case to the N.A.T. He has no discretion in the matter, except within the limits circumscribed by Art. 2 (4). See Viscount Simon, L.C., in the *Bolton* case, at p. 427 top, and Lord Wright, *ibid.*, p. 432 E.

[60] For a description of the N.A.T., see Sir David Ross, *Industrial Relations in Great Britain*, 58 L.Q.R. 184, and for an enumeration of the original personnel of the N.A.T., Price, *l.c.*, pp. 142–143.

the matter for settlement. As soon as the Minister takes the matter up, the conditional prohibition of hostile action becomes absolute.

Such—in rough outline—is the present law governing the prevention of strikes and lockouts[61]—apart, of course, from the provisions of the Trade Disputes Act, 1927, which we can disregard for the purposes of this paper. It means that the weapons of the strike and of the lockout have been taken out of the hands of the organisations in all substantial cases, and in order to find a guarantee for the observance of the collective terms, they are now compelled to look for the sanctions provided by the law. These sanctions are contained in Art. 2 (5) and in Art. 5 of the Order.[62] The rough effect of these provisions is that (1) the terms of those agreements which have been concluded as a consequence of a reference by the Minister are fully enforceable as between individual employers and workers and become the law of the trade, and that (2) all employers are obliged to observe the terms of agreements which have been concluded by organisations which are substantially representative. The sanction of the latter provision, however, is purely criminal.

Compulsory Normative Effect of Collective Agreements under Art. 2 (5)

Whether a dispute results in a new agreement or in an award imposed from above, e.g. by the N.A.T., no strike or lockout is permissible which

[61] The meaning of "trade dispute" was authoritatively explained by the House of Lords in the *Bolton* case. In the Industrial Courts Act and in the National Arbitration Order the word "trade" has, as Lord Wright (at p. 432 H) pointed out, a "wide connotation," and the same is true of the word "workman," the meaning of which in this context is, as the Lord Chancellor said (at p. 427 D, p. 428 C), quite different from that which it bears in the Trade Disputes Act, 1906. The House held, in the words of Lord Porter (at p. 436 G) that the definition includes "all employers, all employment and all workmen, whatever the nature or scope of the employment may be." It therefore includes the administrative officers of a local authority. The House refused to apply the *eiusdem generis* rule to the interpretation of the words "or otherwise." "'Trade Disputes' as used in the Order or in the Act of 1919 are not to be confined either to trade in the narrower sense, nor does the word 'workman' exclude all save the manual or clerical staff; on the contrary, I think it includes those engaged in managerial and administrative duties" (*per* Lord Porter, at p. 437 F). This view was also taken by the Lord Chancellor, by Lord Atkin and Lord Wright, as well as by the Lord Chief Justice and Tucker, J., in the King's Bench Division. Lord Thankerton, however, expressed "grave doubts," while Atkinson, J., in the King's Bench Division, and Bennett, J., in the Court of Appeal, were definitely of the opinion that only disputes and workers in "trade or industry" came within the definition. The House of Lords also held that a dispute as to payments, to be made by the employer after the workman has ceased to serve him, concerns the terms of his employment and can therefore be a "trade dispute."

[62] We have only dealt with those trade disputes which are capable of leading up to a collective agreement, decision, or award. Where the collective element is absent, there may nevertheless be a "trade dispute" within the terms of the definition, but, though the Minister has the power to take up such a dispute, he is not very likely to do so. It is submitted that only a collective trade dispute can lead to a strike which (Art. 7) "means the cessation of work by a *body of persons* employed acting *in combination*, or a *concerted* refusal, or a refusal under a *common understanding* of any number of persons employed to continue work in consequence of a dispute, etc." This element of collective action is absent in the definition of a lockout, and it is not inconceivable that the Minister might refer to the N.A.T. a dispute, say, between an employer and an engineer whose work is of vital importance and whom the employer refuses to continue to employ "with a view to compelling" him "to accept terms of, or conditions affecting, employment."

has the object of enforcing the observance of terms different from those of the agreement or award. This prohibition is directed to the individual employers and workers. There is nothing in the Order to impose any duties upon the organisations themselves, nothing, in particular, to strengthen the contractual effect of a collective agreement concluded as a result of action taken by the Minister. Sect. 4 (4) of the Trade Union Act, 1871, remains in force even in relation to these agreements.

Nor is the mere prohibition of stoppages in itself sufficient to give compulsory normative effect, let alone extension effect, to a collective agreement concluded, or to an award pronounced, under Art. 2 of the Order. An employer can be prosecuted if he resorts to a lockout in order to induce his workers to work at wages lower than those laid down in the agreement or award, but this alone would not invalidate the contract of employment which provides for the lower wages. A worker can be summoned before a magistrate if he takes part in a strike which has the object of forcing upon the employer wages higher or hours shorter than those contained in the "settlement." But this does not in itself imply that he is civilly or criminally liable if he enters with his employer into a contract deviating from the standards of the collective agreement or award. Indeed, no criminal liability is incurred by the workers in such cases at all,[63] while the employer can be prosecuted only if the collective agreement constitutes a set of "recognized terms and conditions" within the meaning of Art. 5 of the Order.

On the civil side, however, Art. 2 (5) introduces an almost revolutionary innovation. It gives full normative effect and at the same time extension effect not only to decisions and awards, but also to agreements made as a consequence of a reference by the Minister, and it does so in terms clearly borrowed from the Cotton Industry (Temporary Provisions) Act:

"Any agreement, decision or award made by virtue of the foregoing provisions of this Article shall be binding on the employers and workers to whom the agreement, decision or award relates and, as from the date of such agreement, decision or award or as from such date as may be specified therein, not being earlier than the date on which the dispute to which the agreement, decision or award relates, first arose, *it shall be an implied term of the contract between the employers and workers to whom the agreement, decision or award relates that the rate of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with such agreement, decision or award* until varied by a subsequent agreement, decision or award."

Leaving aside the normative effect of awards and decisions, we notice that here, for the first time, all the terms of employment contained in a collective agreement have been given the force of law, and not only those referring to remuneration. A comparison with the Cotton Industry (Temporary Provisions) Act, 1934, shows two other very remarkable differences: (1) The agreement concluded as a consequence of a reference by the Minister has automatic normative effect, without the interposition of an order. (2) The terms of the agreement are not minimum terms, but standard terms in the sense that they are incapable of being contracted out either for the benefit of the worker or for that of the employer.

The first characteristic of the new provision may have something to do with the fact that there has been a previous reference by the Minister

[63] This is clear from a comparison of Art. 2 (5) of the Order with Defence (General) Regulation 92.

to the collective parties which, in a way, can be said to have taken the place of the subsequent order under the Cotton Act. Yet, this explanation does not carry us very far, because it must be remembered that the Minister has no discretion in this matter. He must refer the dispute to the voluntary conciliation machinery where it exists. It cannot, therefore, be said that the compulsory normative effect of agreements made under Art. 2 derives from a delegation of legislative power by the Minister, at least this is true only in a very formal sense. It is more in correspondence with the social facts to say that the parties to these agreements themselves have been deliberately made organs of subordinate legislation. And, what is much more, there can be no manner of doubt that the "employers and workers to whom the agreement relates" are not only the members of the contracting parties, but also the outside employers and unorganised workers whose contracts fall within the territorial and industrial scope of the collective agreement. This interpretation is the only one which is compatible with the social purpose of the provision to settle the conditions of employment throughout the industry. It is also the only one which is in harmony with the context in which the words appear, for the agreement is put on the same footing as awards and decisions which cannot possibly distinguish between organised employers and workmen and others. It follows that—an almost unprecedented step in labour legislation—collective parties have acquired the power to legislate by agreement not only for their members, but also for outsiders, without there being any necessity for an administrative act confirming the agreement. English law has introduced the automatic extension effect.

The second feature of the provision mentioned above can only be understood against the special war time background of this legislation.[64] Where the demand for labour exceeds the supply and where the Government is concerned not only with the upholding of certain standards of labour conditions, but also with the prevention of "poaching" on the part of employers and the checking of inflationary tendencies, the collective agreement can and does become an instrument not only of social but also of economic policy. It lays down not only minimum wages but also maxima, not only maximum hours but also the minimum amount of work required from the workers. If this is its object, contracting out cannot be permitted in any circumstances, not even for the benefit of the worker. It is highly significant, and it should be considered as a very serious matter by those responsible when this legislation is to be adapted to post-war conditions, that the organisations on both sides have become legislative instruments for purposes quite outside their original purely social *raison d'être*. The question is whether it can be tolerated under peace time conditions that the collective agreement becomes the reflection of the economic policy of the Government. We have every reason to doubt whether the Minister of Labour, the British Employers' Confederation, and the Trades Union Congress, intended the Order to have this effect when it was drafted in 1940. But the lawyer as well as the sociologist is not so much concerned with the intentions which prompted a legislative measure as with the consequences to which it leads in practice.

It is, of course, necessary to remember that shop agreements and

[64] The fixing of maximum wage rates by collective agreement is not by any means a novel phenomenon. See Amulree, *l.c.* p. 4, note 1, quoting sect. 4 of the Munitions of War Act, 1915.

agreements to which several individual employers are parties do not come within the scope of the Order at all.

An agreement made under Art. 2 may have retrospective effect—back to the date "on which the dispute to which the agreement relates first arose." Thus arrears of wage increases may have to be paid as far back as that date, and, if the agreement interferes with the employer's freedom of dismissal, or the worker's freedom to leave his job, a contract of employment may be revived retrospectively by the agreement. Nothing is, perhaps, more characteristic for this new departure in English law than the retrospective character of the legislative power vested in the collective parties.

The normative effect of the collective terms may survive the collective contract itself—a separation of the normative from the contractual function—for it continues "until varied by a subsequent agreement, decision or award." Even if the collective agreement expires—by notice or otherwise—its terms remain binding on the employers and workers concerned until a new collective regulation is put in its place. The object of this "survival" effect (which is the corollary to the retrospective effect) is to make it impossible for the individual freedom of contract to revive even temporarily. Thus the gap opened by protracted wage or other negotiations has been bridged.

The provision, incidentally, would seem to show not only that an award, e.g. of the N.A.T., can vary the existing normative terms of a collective agreement, but that the opposite is, at least theoretically, possible. This means: the pronouncement of an official body can be varied by a private contract.

Where a dispute arises between employer and workman as to the interpretation of these collective terms, the decision may, theoretically, be one for the Court. In many cases it will be settled by voluntary machinery, in others it will be dealt with under Art. 5 of the Order to which we must now turn.

Recognised Terms and Conditions

So far we have only dealt with collective agreements which owe their origin to a trade dispute and a subsequent reference by the Minister. Since prevention is better than cure, the Order also deals with cases which have not yet ripened even into a threat of a trade dispute,[65] but which might if left alone lead to that situation. Frequently friction is caused by conflicts of opinion as to the "nature, scope and effect" of collective agreements, i.e. by their interpretation, and also by a difference of opinion as to whether or not collective terms have been adhered to. It is this sort of quasi trade dispute which is regulated by Art. 5. This introduces into English labour law the new conception of "recognised terms and conditions of employment."

"Recognised terms and conditions of employment" are the terms of a collective agreement or voluntary collective award to which the

[65] According to Art. 2, a trade dispute may be reported to—and subsequently referred to arbitration by—the Minister, if it "exists or is apprehended." The view was expressed in the *Bolton* case by Bennett, J., in the Court of Appeal, that the words "or is apprehended" enlarged the meaning of "trade dispute" beyond that given to these words in the Industrial Courts Act, and that the words were, therefore, *ultra vires*. It is satisfactory to note that this view was not shared by the House of Lords.

parties on both sides are organisations. It is, however, necessary that both organisations are "representative respectively of substantial proportions of the employers and workers" engaged in their trade or industry and district.[66] It is these recognised terms and conditions which are capable of forming the object of a quasi-trade dispute.

Such representative collective agreements have no compulsory normative effect either upon the members of the organisations or upon outsiders, unless, of course, they are the result of a trade dispute and reference, and, therefore, come within the terms of Art. 2 (5) discussed above. But Art. 5 (1) lays it down that "all employers in that trade or industry in that district shall observe the recognised terms and conditions or such terms and conditions of employment as are not less favourable . . ." At first sight this looks very much like the normative effect we are concerned with. In fact, however, this is a norm with a penal sanction only, and as far as the civil side is concerned, a programmatic blank filled in by a number of very complicated provisions none of which contains anything which could be compared with the normative effect of collective agreements provided for in Art. 2 (5). All that they contain are indirect sanctions the purport of which, however, cannot be properly understood unless the content of the obligation has first been defined.[66a]

The Content of the Obligation to Observe Recognised Terms

The obligation is "to observe the recognised terms and conditions or such terms and conditions of employment as are not less favourable." To the casual observer this seems to express the simple truth that collective conditions of employment are according to their nature minimum conditions for the benefit of the workers. An employer is free to contract out of the recognised conditions, as long as the terms of the contract of employment are in fact more favourable to the worker. Thus if the recognised terms provide for "time and a half" for certain hours of overtime, the employer is free to contract for "double time" (always on the assumption that the terms do not fall within the scope of sect. 2 (5)). To be sure, this is one meaning of the words "not less favourable." At the same time,

[66] Art. 5 (1). Compare the identical words used in sect. 2 (4) of the Industrial Courts Act, 1919. The distinction between "trade dispute" and "quasi trade dispute" which we are trying to make differs from that made by Lord Porter in the *Bolton* case (at p. 437 C, D). "Indeed, it is pointed out that by subsect. 3 of that sect. (5) a dispute which arises as to the observance or non-observance of recognised terms and conditions is not in itself a trade dispute, but only to be treated as such. The argument appears to me to be unsound. In the first place, I do not think that the distinction is between what is a trade dispute and what is merely to be treated as such. The subsection says that such a question is to be treated not as if it were a trade dispute in general, but as if it were a trade dispute *reported to the minister under the provisions of Art. 2 of the order* (italics in the original). In other words, it is not to be dealt with as if it were a trade dispute, which I think in fact it is, but as if it were a particular kind of trade dispute, i.e. a dispute under Art. 2, as to which it is said that 'the provisions of that article shall apply accordingly.'" The question involved in this analysis would seem to be mainly terminological. It does not seem to be of substantial importance whether the "question" referred to in Art. 5 is regarded as a fictitious trade dispute or as a real trade dispute brought within the ambit of the procedure of the Order by means of a fiction. The present writer prefers the terminology used in the text because it may serve to explain the difference between the method of settlement used in Art. 2 and that provided for in Art. 5.

[66a] The penal sanction is provided by Defence Regulation 92: "If any person . . fails to comply with any . . . order . . . made under any of these Regulations, he shall . . . be guilty of an offence. . . ."

however, the draftsman of the Order has used the words "not less favourable" in order to convey another highly technical meaning. The Order gives to the employer the right to observe a number of alternative terms and conditions, i.e. to incorporate in the contracts of employment terms taken not from the recognised conditions themselves, but from a variety of other sources of law which, whether or not they are more favourable to the worker in fact, are "not deemed to be less favourable." (Art. 5 (2)) However, the employer must not "mix" the various sources of law on which he may thus rely. He has to take one or the other sets of conditions as a whole, and cannot pick the rose without the thorn. But with this qualification the obligation contained in Art. 5 (1) is an alternative obligation, imposed upon the employers who are the sole addressees of the norm and who alone incur criminal liability in case of its violation.

The provisions of Art. 5 (2) are shaped on the pattern of sect. 4 (3) of the Road Haulage Wages Act, 1938, which deals with the definition of what is "unfair remuneration" in the road haulage industry with special reference to C licences. Its broad effect is that wages are not unfair if they are equivalent to those laid down in a number of alternatively applicable sets of conditions, e.g. a road haulage wages order, or a collective agreement applicable to the particular contract of employment in question, or in certain other collective agreements, decisions or awards applicable to similar workers in the same district and trade, or in certain decisions of the Industrial Court. This definition reduces the vague standard of fairness to the fixed measurement of collective regulations. It has been used with modifications, in order to give a concrete meaning to the term "not less favourable" in the Order.

The Order seeks to eliminate demarcation disputes, to simplify the application of collective agreements, and to save the employer the trouble and expense of applying in one workshop, factory or office large numbers of similar recognised terms and conditions. Perhaps this indicates a development from craft to industrial unionism.

The Order permits the employer to select among a number of sets of recognised terms and conditions, provided they all apply in the employer's own industry and district and they all relate to workers engaged in similar work. None of these various terms and conditions must be deemed to be less favourable than the other (Art. 5 (2) (*a*) and (*b*)). It does not matter whether they are contained in an agreement or in the decision of a voluntary body of conciliation or arbitration, such as a joint industrial council, conciliation board, etc. But they must all have been made between organisations on both sides which are representative in the employer's industry and district. This freedom to choose between a number of collective agreements applicable to similar kinds of work diminishes the possibility of demarcation disputes. In industries such as shipbuilding and engineering it is not always easy to say which of several agreements is applicable to the contract of a particular worker, but as long as the employer observes one of them he has fulfilled his obligation. This provides a solution of the troublesome problem of the simultaneous applicability of several collective norms to one contract of employment—a problem which has given rise to innumerable legal difficulties and led to an enormous waste of intellectual energy under the collective labour law of the Weimar Republic. At the same time it simplifies the application of collective regulations especially in those industries which employ skilled craftsmen of various types. Thus, if, say, a small number of welders is employed

among a larger number of riveters, the owner of the shipyard—even though he may be a member of the organisation or organisations parties both to the riveters' as well as to the welders' agreement—acts lawfully, if he pays both the riveters and the welders in accordance with either agreement.

What happens, if there are two types of work, similar to one another, one of which is, and the other is not, subject to a set of "recognised terms"? In this case the employer has no opportunity of choosing between various representative collective agreements, but the Order (Art. 5 (2) (*c*)) allows him to apply the terms of a shop agreement made between himself and a union which represents a substantial number of workers in the industry, though not necessarily in the district—provided, of course, the shop agreement refers to "similar" work. If the owner of the shipyard has made a shop agreement with a union which represents a substantial proportion of the riveters, he may pay the welders in accordance with this agreement, although there exists a set of recognised terms laid down by agreement between a welders' union and an employers' association. He may do this as long as there is no agreement for the riveters made by a representative employers' association. Shop regulation is subsidiary to industrial regulation. A shop agreement can never be regarded as "recognised terms and conditions," but it can be chosen by the employer in preference to such conditions which are applicable to similar workers. This, however, he cannot do if those workers who come within the terms of the shop agreement are at the same time subject to an industrial agreement representative in the area and trade, although the employer himself may not be a member of the organisation which is a party to the latter agreement.

Where regulations have been laid down for "similar" types of work by a policy-making body, such as the N.A.T. or the Industrial Court, an employer is always at liberty to incorporate them into his contracts of employment, even in preference to any recognised terms and conditions which may be applicable (Art. 5 (2) (*d*)). The award need not even relate to this particular employer at all. It is sufficient if any other employer in the same industry and district comes within its terms—either as a party to the proceedings or simply as a member of the industry the working conditions of which the award regulates. Awards of this kind are thus extended to similar work in the trade and area. If the award has compulsory operation under sect. 2 (5) of the Order, this does not, of course, extend to such similar contracts. But an employer can, at his option, give effect to a policy of unification of labour conditions in his district by allowing these awards to displace the voluntary recognised terms applicable to similar work, whether or not he himself is directly affected by the award. In these limits the normative effect of collective agreements—such as it is—is pushed aside in favour of the national wage and labour policy embodied in these decisions.[67]

Lastly, there is the question of labour conditions laid down by statute. Whatever be the normative function of collective agreements, it must

[67] Art. 5 (2) (*d*) speaks of "the National Arbitration Tribunal, the Industrial Court, *or any other body or person acting in the capacity of arbitrator*," but the italicised words can only refer to arbitrators appointed on a national scale, e.g. by the Minister under Art. 2. If they included arbitrators, acting under collective agreements, the clause would contradict the wording and the policy underlying the previous provisions which give precedence to recognised terms and conditions laid down by or between collective parties on both sides to voluntary regulations applicable only to the undertaking of a single employer.

always yield to that of statutory or administrative regulations directly applicable to the contract of employment. Regulation of hours, etc., in Factory and Coal Mines Acts, regulation of wages by trade boards, etc., are, of course, minimum regulations for the benefit of the worker. Collective agreements can and do frequently lay down conditions more favourable to the workers affected by legislation or subsidiary legislation and are, insofar, valid. The employer would violate his duty to observe recognised terms and conditions if he applied statutory standards less favourable to the worker. The Order (Art. 5 (2) (*e*)) makes, however, a distinction between employers who are members of organisations which are parties to a collective agreement or award or to a national award, and outsiders. An employer of the first category cannot choose any statutory or administrative norm in preference to recognised terms which apply to a given contract of employment and which in fact are more favourable to the worker. But an outsider may do so, if the terms of the statute refer to any similar type of work, not necessarily in the same trade and district.[68]

Thus, to sum up, the employer must observe recognised terms and conditions referring either to the particular type of work, or a similar type, or in the absence of the latter, a collective agreement made by himself with regard to similar work. A number of collective agreements have thus been given alternative operation. In certain cases they can all be displaced by national awards and by statutory and administrative regulations. These alternatives are not open to an employer who is subject to an agreement made under Art. 2 as a result of a trade dispute reported to the Minister. But, what is more, an Order made by the N.A.T. for the enforcement of recognised terms and conditions binds the employer and workers concerned and cannot be contracted out in either direction, not even by choosing one of the alternative regulations described above.[69] The latter order is made under Art. 5 (4), which will be discussed presently.

The Sanction of the Obligation

The obligation to observe recognised terms or alternative regulations is imposed upon the employers only, not upon the workers. It is imposed upon all employers, no matter whether they are members of organisations or outsiders, or whether the worker concerned is a union member or not. But the sanction of the obligation is purely penal. It is clear that an employer can be prosecuted if the collective minimum wage is X, and if he contracts with a worker for a wage of X minus Y and pays that lower wage. What is not so clear is, whether the penal sanction extends to conditions of engagement as distinguished from terms of employment. Is an employer liable to punishment, if, in defiance of a clause in a collective agreement, he employs a boy or a woman on a particular job? There is

[68] The wording of Art. 5 (2) (*e*) is difficult to understand. On the face of it it seems to exclude the choice of statutory provisions applicable to the same worker, and only open up the possibility of choosing those referring to similar workers, which is absurd. It also looks as if it did not matter whether the statutory conditions were more or less favourable than those of the recognised terms directly applicable to the worker, and as if the only standard of comparison were the agreements, etc., referring to similar workers. The distinction between various categories of employers looks as if it was taken from their relationship to "similar" agreements, etc. All these difficulties can be solved by substituting the word "article" for the word "paragraph." The text assumes that this substitution is permissible and necessary.

[69] "Subject to the provisions of paragraph (4) hereof" in Art. 5 (2).

in the Order no definition of "terms and conditions of employment," but one is inclined to give these words a narrow interpretation, and one cannot but hesitate to believe that it was the intention of the draftsman to go to the length of making dilution of labour a criminal offence.

Be that as it may, as far as the terms of employment themselves are concerned, the Order has given automatic compulsory and extension effect to collective agreements concluded on both sides by organisations which are substantially representative.

At the same time this compulsory and extension effect is confined to the criminal law. If the employer contracts for a wage lower than that provided in the recognised terms and conditions, he can be prosecuted, but the worker cannot claim the difference.

In war time an employer is unlikely to act in open defiance of collective agreements without relying on some right to do so. If he simply relies on the absence of civil sanctions without any colour of a right, the only way out of the impasse is a criminal prosecution and the settlement of the difference as a trade dispute. If no amicable solution can be found, the only thing to be done is to report the case to the Minister as a trade dispute, and thus to open the way to an agreement, decision or award which is directly enforceable under Art. 2.

But all this is not likely to happen. The employer or his organisation will probably be of the opinion either that there are no recognised terms (e.g. because the parties to the agreement are not sufficiently representative), or that the contract of employment is not covered by such terms, or that the terms have not been violated, e.g. because the employer has complied with a permissible alternative regulation. A question of this kind "as to the nature, scope, or effect of the recognised terms and conditions . . . or as to whether an employer is observing the recognised terms and conditions or . . . terms and conditions which are not less favourable . . ." need not be left to the hazards of a decision by a criminal court. It may be taken up by a trade union or an employers' association and treated as a quasi trade dispute, and reported as such to the Minister (Art. 5 (3)). It may be so reported but it need not be. Real trade disputes must be taken before the Minister before hostile action can be taken, but the report of quasi trade disputes is always optional. The decision to report or not to report does not in this case rest with individual employers or workers at all. Neither does it exclusively rest with those organisations which are parties to the recognised terms and conditions. "Any organisation of employers or any trade union which in the opinion of the Minister is an organisation or trade union that habitually takes part in the settlement of wages and working conditions in the trade or industry concerned," may make the report. It may emanate from an organisation which does not operate in the particular district at all, or from a rival union operating in the same area, or from a national union.

As soon as the question has been reported to the Minister, he must take action, and deal with the question "in the same manner as if it were a trade dispute reported to the Minister under the provisions of Art. 2." "The provisions of that Article shall apply accordingly."

If, in the Minister's opinion, suitable voluntary means of settlement exist he must refer the question to those voluntary bodies. This, however, is not very likely to lead to a result, because no rupture has yet taken place between the parties—otherwise it would be a real trade dispute—and they have probably already made a vain attempt at a voluntary settlement.

If no voluntary machinery exists or if it exists but breaks down, the Minister may take "any steps" or refer the matter to the N.A.T.

Has a collective agreement, a decision or an award made upon a reference by the Minister under Art. 5 the same normative compulsory effect as if the reference had been made under Art. 2? The words "the provision of that Article shall apply accordingly" seem to indicate that this is so, and that recognised terms and conditions which have been subject to an agreement, decision or award involving an authentic interpretation bind all employers and workers concerned—without any possibility of a variation upwards or downwards, without even an option to choose one of the alternative collective or other regulations mentioned above.

This interpretation is, however, contradicted by Art. 5 (4), which reads: "Where an award has been made by the National Arbitration Tribunal in consequence of a report made under the foregoing provisions of this Article then as from the date of the award or from such date as the Tribunal may direct, not being earlier than the date on which the question to which the award relates first arose, it shall be an implied term of the contract between the employer and workers to whom the award applies that the rate of wages to be paid and the conditions of employment to be observed under the contract shall, until varied by a subsequent agreement, decision or award such as is mentioned in the foregoing provisions of this Article, be in accordance with the award."

This seems to reserve the binding normative effect to awards made by the N.A.T. only. The presence of this provision in Art. 5 seems to show that in the case of quasi-trade disputes under Art. 5 no agreement and no decision or award other than one rendered by the N.A.T. itself can have any compulsory civil effect at all.

This difficulty of interpretation can perhaps be overcome with the help of the following considerations. Collective labour disputes are of two different kinds. They are either disputes as to rights or conflicts of interests. An employer or employers' organisation and a trade union may have a difference of opinion as regards their rights and liabilities under an existing agreement, or quarrel about its interpretation or its application to the employers and workers. These are legal questions which —but for sect. 4 of the Trade Union Act, 1871—could be taken before a court of law, and which can be solved by applying the law and interpreting the contract. But where no agreement exists or an existing agreement has expired, or where one of the parties wishes to alter an agreement in view of changed circumstances, there is no legal problem at all. What there is, is a conflict about the making of new law, a conflict of interests.[70] The term "arbitration" is, somewhat loosely, applied to the settlement of both types of conflict, while in the case of individuals engaged in a conflict of interests, e.g. the negotiation of a new contract, the settlement of terms by an impartial third party would not usually be called "arbitration."[71] Long before the days of trade unionism and collective disputes

[70] The analogy with the well-known distinction between legal and political disputes in International Law is obvious. See Oppenheim—Lauterpacht, *l.c.* vol. 2, p. 4. The terms "disputes as to rights" and "conflicts of interests" are borrowed from International Law.

[71] Compare sect. 9 of the Sale of Goods Act, 1893: "Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party. . . ." The distinction made in the text is broadly the same as that between valuation or appraisement and arbitration within the meaning of the Arbitration Acts, 1889 to 1934. See Hogg, *Law of Arbitration*, p. 9.

the importance of the distinction was recognised in the law of master and servant, but subsequently the failure to distinguish between the fixing of wages for work done and for work to be done led to confusion. It partly accounts for the unfortunate history of British industrial arbitration legislation in the nineteenth century.[72]

The trade dispute envisaged by Art. 2 of the Order of 1940 is primarily, but not necessarily, a conflict of interests. Even a dispute as to rights may come within the legal definition of a "trade dispute," i.e. a "dispute or difference . . . connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person." However, it is clear from Art. 2 that, whatever course the Minister decides to take in order to settle an actual or apprehended trade dispute, the impartial tribunal called upon to deal with the matter must do so without being bound by existing collective agreements. Even a purely legal difference of opinion is treated as a conflict of interests where the settlement of trade disputes is involved. The maintenance of production is more important than the preservation of existing rights. Thus, if the dispute reported to the Minister under Art. 2 arose from a pure conflict of interpretation of, say, the overtime pay clauses in a collective contract, it may result in a binding agreement, decision or award, which lays down entirely new principles of overtime pay.

Not so in the case of the quasi trade dispute regulated by Art. 5. Its essence is that it originates in a divergence as to existing rights, and any impartial tribunal which has to solve the "question," performs a judicial function, no matter whether it is a voluntary body set up by the parties themselves or an *ad hoc* board established by the Minister. If the Minister refers the quasi trade dispute to a voluntary board or council, the parties may, of course, arrive at a new agreement by which they not only interpret but vary the terms of the old one, and there is no reason why a decision or award should not do the same thing, provided the organisations on both sides agree to this course. But in the absence of such agreement, the quasi trade dispute can only lead to an interpretation of the existing conditions of employment and, subject to what has to be said below about the N.A.T., not to a variation. The procedure under Art. 5 may be outwardly similar to that under Art. 2, its essence is totally different.

Now it is one thing to give binding normative effect to agreements, decisions and awards which embody new labour conditions and which are made in order to settle a trade dispute, and another thing to clothe with the effect of *res iudicata* interpretative decisions in purely legal disputes rendered by voluntary and *ad hoc* bodies. With *res iudicata* effect, that is, not only as between the individual employer and worker between whom the question may have first arisen, but between all those employing workers and working in the trade and area.[73] And, what is more, it would be rather strange if a recognised term became civilly binding

[72] For the difference between the Cotton Arbitration Act, 1800, 39–40 Geo. III, c. 90, and the arbitration clause in the Combination Act, 1800, 39–40 Geo. III, c. 106, see Amulree, pp. 26–29, 35–36. It seems that Pitt was quite aware of the distinction and used it for his own purposes. For the subsequent confusion, especially in the report of the Select Committee on Equitable Councils of 1856, see *ibid.* p. 67. For the failure of Lord St. Leonard's Act, 1867, *ibid.* p. 81.

[73] It is precisely this kind of *res iudicata* effect of an arbitrator's decision in a collective dispute as to rights which the Exchequer Chamber refused to recognise in *Hill* v. *Levey* (1858), 3 H. and N. 702. For details see Amulree, p. 59. The case was discussed before various Royal Commissions. It played an important part in the social history of the printing industry.

upon individual employers and workmen, including outsiders, simply because it happened to be the object of a difficulty of interpretation, leading up to a decision by an arbitrator. Would it not be odd, if the civil sanction of the general obligation to obey recognised terms and conditions was to be found in the possibility of extrajudicial authentic interpretation with binding effect?

Thus, despite the sweeping reference to Art. 2 in Art. 5, there is a great deal which speaks against the conclusion that agreements made, and decisions or awards rendered, under Art. 5 share the compulsory normative effect provided for in Art. 2. It should also be remembered that the latter is, to a certain extent, the corollary of the conditional prohibition of hostile action. In cases under Art. 5 no hostile action is threatened from either side, and there is therefore perhaps less necessity for the legal sanction.

Nevertheless, Art. 5 (4) does give this binding effect to an award made by the N.A.T. in an interpretative dispute dealt with under Art. 5. Awards made by the N.A.T. are singled out amongst others for this purpose. Why should that be so? Why should an award made by the N.A.T. have a compulsory civil effect denied to an award emanating from a voluntary conciliation board? Why should the Order suddenly jettison its obvious preference for settlement by voluntary bodies, a preference which runs through the whole of British industrial legislation, such as the Conciliation Act, 1896, and the Industrial Courts Act, 1919? Why this apparent departure from the Whitley spirit?

It seems to the present writer that the answer can be found in the Order itself. The Minister must refer the quasi trade dispute to voluntary settlement if there is any chance of doing so with success (which is unlikely in these cases). But as soon as the existing dispute as to rights is referred to the N.A.T., it is treated as a conflict of interests. Only the N.A.T. can treat it thus, and indeed must do so. It must use the interpretative dispute for a policy making decision in conformity with its general wage policy. It does not simply interpret the recognised terms and conditions which form the object of the dispute, it takes into consideration the various "not less favourable" alternative regulations applicable to "similar workers" in the same industry. But it does more. It has regard "to any collective agreements concerning the terms and conditions of similar workers in *comparable* trades or industries" (Art. 5 (3)). It uses the legal conflict in order to pursue its policy of regulating and unifying labour conditions, without being hamstrung by industrial or territorial boundaries or existing agreements. To give to an award of this kind compulsory normative effect does not mean to introduce the institution of *res iudicata*, because the award is not a judicial decision at all, but an order which creates new law. It should always be remembered, however, that such policy-making Orders presuppose an application to the Minister by one of the parties concerned. Here, as elsewhere, we are faced with the phenomenon, that the present wage and labour policy of Great Britain constitutes a compromise between the idea of spontaneous collective action and that of state regulation of wages and conditions of employment.

The only civil sanction, then, of the obligation to obey recognised terms is, that they can—in cases of difficulty of construction, etc.—be submitted to the N.A.T. and that they can be used for the moulding of new labour conditions made by the N.A.T. which bind the individual

workers and employers[74] if necessary with retrospective effect back to the time when the "question" first arose.

Once such an award has been made, it becomes part of the relevant contract of employment, without any alternative recourse to other similar agreements, awards, etc.,[75] without any possibility of contracting out for the benefit of either party. It has this effect "until varied by a subsequent agreement or award such as is mentioned in the foregoing provisions of this Article," a clause which, in the nature of things and despite its wording, cannot refer to agreements, etc., governing the contracts of "similar" workers but only to those of the worker concerned himself. Such a subsequent agreement, etc., may contain recognised terms the violation of which is a criminal offence for the employers, but otherwise it does not bind the individuals, unless it has been made in the course of a genuine trade dispute. Nevertheless, it puts an end to the normative effect of the award made by the N.A.T.[76]

If this interpretation of the Order which cannot be but tentative is correct, it follows that collective agreements as such have no compulsory civil normative effect under Art. 5 at all, because this effect is reserved to awards made by the N.A.T. It must be admitted, however, that the wording of the Order is not always clear and gives rise to many doubts, many of which have not been solved by the above analysis.

The result is this: collective agreements made under Art. 2 (5) have full civil compulsory and extension effect, but no effect in criminal law. Precisely the opposite is true of recognised terms and conditions. A given agreement may, of course, come under both Articles.

Conclusion

It is perhaps permissible to draw a few general conclusions from the discussion of the Order of 1940. The legal enforcement of collective agreements, is, as we have said above, a political problem of the first magnitude. The solution embodied in the Order is that all the more important agreements must be observed by the employers who are liable to criminal prosecution if they fail to do so, and that the individual workman derives direct civil rights from those agreements which have been made as a consequence of a ministerial reference in the case of a trade dispute. This is a war time expedient and no more. Whatever may have been the original intention of the Order—and it is more than probable that in

[74] Compare the wording of Art. 5 (4) with that of Art. 5 (1).

[75] See Art. 5 (2).

[76] It does not seem permissible to draw any exaggerated conclusions from the use of the singular "employer" in Art. 5 (4), in contrast to the plural in Art. 2 (5). It would be legalistic in the extreme and contrary to the social scheme underlying the Order to infer from this that the award rendered by the N.A.T. binds only the employer in whose factory, workshop, office, etc., the dispute as to rights first happened to arise. This individual conflict is only the occasion which gives rise to a collective conflict, it is the latter which is involved in a case under Art. 5—for it is only if a collective organisation deems the individual question important enough for the collective hue and cry to be raised that the machinery of Art. 5 is set in motion at all. It would be ludicrous if the collective mountain parted and gave birth to an individual mouse. Besides, the conflict of rights may arise in the workshops, etc., of more than one employer simultaneously and it may be a general question "as to the nature, etc., of the recognised terms and conditions in any trade or industry in any district." The present writer prefers to attribute the use of the singular in Art. 5 (4) to a drafting error.

1940 it was not meant to be more than an instrument for the prevention of industrial friction—it has become part of the general scheme for the planning of the labour market, of wages, hours and other conditions of work. It is within this scheme that the collective agreement has found its place in war time. The State has decided to use the freely negotiated collective bargain as part of the processes of social and economic war-time planning.

But to say this, is to acknowledge that the role played by the collective agreement in society has changed. When Mr. and Mrs. Webb "discovered" the collective agreement, they could describe it as a means of counteracting the natural inequality of bargaining power between capital and labour. Under its influence the level of wages tended to become the result of balanced collective forces. It reflected no longer the bargaining power of individuals, but the relative strength of organised labour and organised employers. It was, in limits, the anticipated result of the labour dispute which it prevented. The method of collective bargaining had this in common with that of free competition: that it left the determination of the price of work—and the conditions under which wages were earned—to the free interplay of social forces, collective forces, it is true, not individual forces. This is not the theory which underlies the Order of 1940. There the collective agreement appears as part of a plan laid down by the political organs of the State. Employers' organisations and trade unions tend to become instruments for the realisation of the social and economic policy of the government—their contracts no longer reflect their own fighting strength, but the standards of adequacy laid down by the State. The social wage becomes a political wage. The influence of both capital and labour on the conditions of employment must assert itself in the political field rather than in the industrial field.

This war-time phenomenon was foreshadowed by an unmistakeable development which occurred between the world wars, and the theoretical expression of which can be found in Milne-Bailey's book on *Trade Unionism and the State*. The question is to what extent it will be allowed to continue when the war is over.

How far can labour disputes and free negotiation of wages and other conditions of employment be regarded as compatible with the planning of wages by the State? How far must these processes be changed under conditions of "full employment"? It is questions of this kind which—above and below all legal refinements—must determine our attitude towards the problem of the enforceability of collective agreements. The present writer is convinced that the traditional British method of trade union negotiation can be reconciled with state planning, but the terms of the compromise will have to be carefully considered by trade unionists and employers. The combination of state minimum wage legislation with collective bargaining which has been one of the peculiar achievements of British labour law and the importance of which was emphasised by the Whitley Reports may perhaps show the way towards a solution of the problem. Those who have to consider the future of collective labour law in Britain must be invited to keep before their eyes the political significance of the difference between the method of compulsory arbitration and that of the legal enforceability of the freely negotiated collective agreement. The latter may help to strengthen a free trade union movement, while the former is almost certain to undermine it. Thus, of the two distinct legal institutions embodied in the Order of 1940 one, the conditional prohibition

of stoppages coupled with the compulsory powers of the National Arbitration Tribunal, should be regarded as a temporary war measure only. But the normative compulsory effect of collective agreements may come to stay in Post-War Britain.

British collective labour law is in one respect unique among the legal systems of the larger industrial countries. Trade union "recognition" was achieved in this country by purely industrial as distinct from political and legislative action. No Wagner Act, no Weimar Constitution, no Front Populaire legislation has imposed upon British employers the duty to enter into negotiation with trade union representatives. The proud edifice of collective labour regulation was built up without the assistance of the "law." After the war the relationship between collective bargaining and the law may have to be redefined. Let it then be remembered that legal over-refinement and analysis is apt to have the effect of a mildew on a fresh plant. It is only if the law can adapt its own methods to the requirements of this new branch of legal learning that it can hope to achieve fruitful results.

O. KAHN-FREUND.

THE CZECHOSLOVAK JURIDICAL COUNCIL

A BOLD ATTEMPT AT SOLVING THE PROBLEM OF ADMINISTRATIVE JUSTICE ABROAD

IN Czechoslovakia the defence of the rights of citizens against all the organs of public administration, including even the President of the Republic, was entrusted to a special administrative tribunal—the Supreme Administrative Court. Anyone who felt that his rights were affected through a decision made by any administrative officer could turn to this Court for protection. And State officials themselves could call upon its services for the defence even of those of their rights which were associated with their status as civil servants. This Court was composed of a number of Senates, composed of entirely independent and highly qualified judges —experts in all possible questions relating to public law. During its brief independent existence—from the creation of the Republic to the occupation after Munich and the Ides of March, 1939—it gave decisions in thousands and thousands of cases, and often reversed those of the highest State organs. Its judicature, published in a special collection, became an almost authoritative and very valuable interpretation of all kinds of rules of public law. Through its activity the highest administrative court became one of the chief pillars of the Czechoslovak rule of law (and thus of democracy; for only a state in which an unconditional observance of all rules of law is fully guaranteed can be, and remain, really democratic.)

The Czechoslovak Supreme Administrative Court remained, however, in Prague after the German-Hungarian occupation of Czechoslovakia, and then came into the hands of the Nazi occupants—thus immediately losing all the attributes which made it so outstanding as an institution—and ceasing, in fact, to be a court at all.

Meanwhile there was created and internationally recognised on the soil of the United Kingdom the Czechoslovak Government and the President of the Republic, and there was gradually built up the whole of the Czecho-

slovak State machinery—in so far as this was in any case possible and useful. There were thus instituted in Great Britain—on a small scale, yet in such a way that they could carry out over here at least the most essential parts of the State administration—the Ministries of Foreign Affairs, the Interior, National Defence, Social Welfare, Justice, Education and Economic Reconstruction, while there were further created certain central administrative offices—such as the Chancellery of the President of the Republic, the Presidium of the Council of Ministers and the Supreme Office of Control of State Accounts.

And then—when the work of this Czechoslovak State administrative apparatus had been fully set in motion—it was suddenly discovered that something was lacking—and that was provision for administrative justice. In private (civil) law matters there were available the British civil courts. And even though a considerable number of Czechoslovak officials enjoy over here exemption from the local jurisdiction of the courts, on the score of their diplomatic immunity, in case of necessity the President and the Czechoslovak Government can waive such rights for any one of their officials. For matters of criminal *military* justice there are also over here the Czechoslovak Military Courts, even though their jurisdiction is notably weakened. Nevertheless, for questions of Czechoslovak public law no *judicial* forum was established. Those supreme sanctions which were provided in the Republic by the Supreme Administrative Court against possible errors on the part of the administration, and against the possibility of illegal decisions by the Czechoslovak ministries and their offices, were over here not available.

In view of the anomalous situation in which the Czechoslovak Government at present finds itself this state of affairs is comprehensible enough, and no objection could reasonably be made to it. For the right of making complaints regarding decisions of offices of the Czechoslovak Republic abroad would still be guaranteed to Czechoslovak citizens, and they could be realized after their return home by application to the re-instituted Supreme Administrative Court of the Republic. But this was not enough to satisfy the well-known and typical Czechoslovak sense for the rule of law, which once again manifested itself in the most complete and clear fashion. The Czechoslovak President—true to the traditions of the Republic of Masaryk—made every effort to see that even in this exceptionally revolutionary time, in which the principles of law are so difficult to apply, the objectivity of the decisions of the Czechoslovak administration should be ensured as far as possible, as well as the fullest respect for law—and that therefore even to-day the citizens of Czechoslovakia should not remain without proper protection in respect of such matters. On the motion of his Government, the President of the Republic instituted over here, for the purpose of extra-governmental concern regarding public law—as a substitute for the Supreme Administrative Court—the Juridical Council. Its statute and jurisdiction were determined by the President of the Republic by a special Act drawn up in the form of a letter to the Czechoslovak Prime Minister. *This Act represents a complete novelty in the realm of administrative law,* and its character and boldness are so interesting that it is appropriate to quote it here *in extenso*—

"Mr. Premier,

"The Government, being concerned to provide our State machinery abroad—as a substitute for the administrative judicature which is not

realizable over here—with at least an impartial legal advisory authority, decided in its session of 30th January, 1942, to suggest to me that I should institute a Juridical Council of the Czechoslovak State Machinery.

"As I share the attitude of the Government, and am prepared to act upon their suggestion, I hereby institute a Juridical Council of the Czechoslovak State Machinery, controlled by the following regulations—

"1. The Juridical Council of the Czechoslovak State Machinery is a body of five members, the President, Vice-President, and three members of which are nominated by the President of the Republic (on the motion of the Government) for the purpose of giving its legal advisory opinion as to whether a particular enactment or decision of the Government or of any of the central offices is compatible with the Czechoslovak juridical order.

"2. The Juridical Council will itself arrange its procedure. Those of its members who are at the same time officials of the State machinery will exercise their functions in the Juridical Council independently of their official position in the administration, and are in respect of such matters responsible only to their conscience.

"3. The opinions of the Juridical Council may be asked for as each case requires by the President of the Republic or the Supreme Office of Control of State Accounts, or by any Czechoslovak citizen whose rights are affected by a particular enactment or decision.

"4. The Juridical Council shall invite the central office regarding the enactments or decisions of which it is called upon to deliver a legal opinion to explain through its representative verbally the procedure followed with respect to them. The Juridical Council shall not examine questions of fact. After a declaration by the Minister of Justice or his representative, and if it is a question of military law, then also after a declaration by the President of the Supreme Field Court, the Juridical Council will give its opinion and communicate it to whomever has sought it, as well as to the appropriate central office.

"5. The Ministry of Justice, or another central office through its intermediary, may also demand of the Juridical Council legal opinions *de lege ferenda*.

"6. The work of the Chancellery of the Juridical Council will be dealt with by the Ministry of Justice, in accordance with the instructions of its President, and its chief officer will be the secretary of the Council. Those members of the Council who are not officials of the Czechoslovak State Machinery and who are unremunerated will be suitably rewarded for their services.

"Dr. Eduard Beneš."

"London, 4th February, 1942.

I. The Quasi-judicial Function of the Juridical Council

From the above statute it will be seen that the legal character of the Juridical Council is determined by the following major principles—

1. The Juridical Council is not a *judicial* organ and it does not lie within its jurisdiction to make judgments which would without further reference become binding upon administrative offices. It can only give legal *opinions*, the force of which lies solely in the legal conviction and arguments by which they are supported.

2. The Juridical Council is entitled to judge only whether this or that concrete act of the Government or of any central office is or is not consistent with the valid Czechoslovak legal order. This enactment affects the decisions of *all* Czechoslovak *administrative* organs which have so far been functioning in the territory of the United Kingdom.

3. The right to invoke the opinion of the Juridical Council—i.e. what we describe as active legitimation—falls to—

(*a*) The President of the Republic.
(*b*) The Supreme Office of Control of State Accounts.
(*c*) Any Czechoslovak citizen whose rights are affected by a definite concrete act of the State administration.

As I see the matter, this last provision—under (*c*)—represents the backbone of all the quasi-judicial construction of the Juridical Council. *It means that any Czechoslovak who feels himself to be in any way injured by this or that Czechoslovak office may turn to the Juridical Council for assistance.* And it means further that this Council is obliged to concern itself with the matter and furnish its opinion, supported by appropriate legal grounds for its decision.

4. The members of the Juridical Council—who are nominated by the President of the Republic on the motion of the Government—*are entirely independent while exercising their functions*, and are in this respect answerable only to their consciences.

From all the above it is evident that the Juridical Council has all the main attributes of a regular judicial organ, except the most fundamental of all: that of the formal binding force of its decisions, which can therefore from the legal standpoint only be considered as advisory opinions. This is really—if we consider only the foundation of the matter and disregard various considerations of a purely procedural character—the only minus of the Juridical Council in relation to the Supreme Administrative Court. This minus is, of course—considered from the theoretical point of view—very substantial. But if we examine it from the purely practical standpoint—which is here the only one of real importance—this difference assumes quite another aspect.

What, for instance, would happen if the Juridical Council gave an opinion *against* an act of the State administration? What sort of practical effect would it have? A Czechoslovak citizen would have in his hands a document in which it was laid down in black and white by a special Czechoslovak organ instituted for the purpose by the President of the Republic that such and such a Czechoslovak office had made a decision which was in conflict with the valid Czechoslovak law. Can one believe that in such a situation the Czechoslovak office affected—even though it might perhaps have objections to make against such an opinion of the Council—would not submit and alter its own decisions? I believe the alternative to be inconceivable, and that *the unfavourable consequences which would result if the office in question persisted in adhering to its illegal decision afford a sufficient guarantee that this course would not be followed.*

It is certain, of course, that from the purely juridical point of view the creation of an administrative *court* in the full sense of the term would have been a more perfect solution. Nevertheless, superior weight had no doubt to be given to metajuristical arguments in the other direction. For it would certainly not be prudent in the given situation to entrust to five individuals appointed *ad hoc* such absolute power over all the Czecho-

slovak State administrative apparatus abroad. There are not over here a sufficient number of individuals who possess the necessary qualifications, for not a single one of the judges of the Czechoslovak Supreme Administrative Court has succeeded in escaping from the Nazi occupation; and there are not available over here in any case all the necessary collections of laws and enactments.

In view of this state of affairs, the creation of the Juridical Council—and the Czechoslovak Government is the first of the exiled governments to proceed to such a solution—with authority on the scale indicated above represents even from the standpoint of the rule of law the best measure which could be adopted in these circumstances. The fact that the Czechoslovak Government, even in the midst of this revolutionary and transitional period, should be concerned to secure such a high degree of legal certainty by laying upon itself such fundamental limitations provides the clearest possible demonstration of the maturity and soundness of Czechoslovak democracy in its activities abroad.

From the point of view of *international* law all this construction does not create any difficulties. The institution of the Juridical Council not only is not *stricto jure* a judicial forum, but it concerns itself with questions the solution of which cannot fall within the competence of any other (foreign) organ, and in respect of which, therefore, the principle of the territoriality of the state power of a host-state is in no way affected.

What is involved is a body of purely public law relations between the Czechoslovak State and its subjects, a body of relations which, in view of their nature, cannot comprehensibly be subject to the cognition of or to revision by any foreign authorities, and whose administration by the Government (in the widest sense of the term), or as the case may be, by the appropriate organs of administrative justice, is implicitly ensured—from the standpoint of international law—by the act of recognition and by the granting of hospitality on the part of the host-state.

II. The *de lege ferenda* Function of the Juridical Council

It will certainly not have escaped the attention of the reader that the Juridical Council was not destined to remain only a quasi-judicial organ, solely and exclusively. As already indicated above, in accordance with Point 5 of its statute the Ministry of Justice, or another central office through its instrumentality, can ask of the Juridical Council legal opinions and recommendations *de lege ferenda*. In this way a legal foundation has been provided for the co-operation of the Council in the preparation and drafting of legislative and other normative provisions.

The objection may perhaps be made that what is here involved is a fusion of the judicial and the normative functions. This fusion is, however, only apparent and does not in any sense violate that fundamental principle of the division of the state power which since the time of Montesquieu has been a distinctive characteristic of democracy. The Juridical Council participates in legislative and normative activity generally only in an exclusively advisory capacity, and its technical testimony can, but need not, be taken into consideration in ultimate normative decisions which over here are solely in the province of the Government or, as the case may be (as far as it is a question of legislative activity in the narrow sense of the term), of the President of the Republic.

The relation, then, between the *de lege ferenda* function of the Juridical

Council and that of the President of the Republic and the Government as the supreme legislators (in so far as the Parliament of the Republic is precluded from meeting) is similar to that which in the Republic was exercised, for instance, by the executive in preparing the draft of a law when the right to accept it as a valid law, or to reject or modify it, was exclusively in the hands of Parliament. And the Juridical Council has actually no initiative even in respect to the preparation of such drafts; it must in every case wait for its services to be called upon by the organs which are here entrusted with legislative and normative powers.

On the other hand, both functions of the Juridical Council—quasi-judicial and *de lege ferenda*—complement one another practically over here in a very satisfactory manner. For if the Council in the course of its quasi-judicial activity discovers certain shortcomings or gaps in the valid legal order, it is able, in the course of its activity *de lege ferenda*, to recommend, on the basis of its experience in this direction, the most appropriate means for eliminating them. Both these functions, therefore, are fundamental elements in one mission: concern for the legality of the Czechoslovak State machinery and its activity abroad. And it can be safely said that this high mission is being carried out by the Council in a conscientious and painstaking fashion, and with a full awareness of its responsibilities.

Ed. Ta'borský.

INCOME TAX ON CAPITAL PROFITS

THE centenary of the Income Tax Act, 1842, the forerunner of our Income Tax Code, having just occurred, this is perhaps a fitting opportunity to epitomize the judicial views on one of the leading principles of this Code, that is to say, that Income Tax is a tax on income, not on capital.

Since Lord Macnaghten's epigram in *Attorney-General* v. *London County Council* (1901), A.C. 26—"Income Tax is a tax on income; it is not meant to be a tax on anything else"—and Lord Halsbury's observation in *Scoble* v. *Secretary of State for India* (1903), A.C. 299—"I think it cannot be doubted, both upon the language of the Act itself and the whole purport and meaning of the Income Tax Acts, that it never was intended to tax capital"—we have been reminded time and again of the paramount importance of this principle: see recently *I.R.C.* v. *British Salmson Aero Engine, Ltd.* (1938), 3 All E.R. 283.

There exists no statutory definition of either "income" or its correlative term "capital," and Lord Macmillan's Committee on the Codification of the Income Tax Law has followed the present law in not attempting a definition of either term. (Report Vol. I—Cmd. 5131—p. 23–24) Lord Halsbury (in *Scoble* v. *Secretary of State for India, supra*) has warned us that the Income Tax Act is not cast upon absolutely logical lines and "that which justifies the exaction of the tax is that the things taxed have either been or have been held to be the subject of taxation." Thus we are referred back to the Code and its construction by the Courts.

When we look at the various charging sections, leaving Schedules A and B for the moment, we find that it is the "profit" or "gain" arising from various sources which is charged with tax. Again, no definition of

"profit" or "gain" is provided by the Code, but it has been held to be an axiom of income tax law that "anything in the nature of a capital accretion is outside the words "profits or gains," as used in these Acts; that, of course, follows from the scope of the Act, and it is sanctified by the usage now of a century." (*Ryall* v. *Hoare* (1923), 2 K.B. 447, per Rowlatt, J.) So much then is clear that income tax is not a levy on capital, and neither the so-called Landlord's Property Tax, Schedule A, nor the so-called Farmer's Income Tax, Schedule B, are exceptions of the principle. It is true that the basis of assessment under the two last-mentioned Schedules is not the profit arising from, but the annual value of, land, but it must be borne in mind that the annual value is the standard only by which the profits derived from the ownership and the occupation of land respectively are measured in terms of rent. The position has recently been delineated by Lord Moncrieff in *Trustees of Earl Haig* v. *I.R.C.* (22 T.C. 725) in these words: "There are accordingly still profits and gains which may be ingathered by the taxpayer, yet may not be subject to tax. A profit may result in accretion to capital as well as in accruer of income. It is profit of the latter order which alone attracts the tax. Profits of the other order are exempt." A great deal of the vast bulk of case law that has grown round the Income Tax Code is concerned with drawing the line between these two classes of profit. The problem bears a different complexion according to whether the Revenue seeks to charge incomings with tax, or whether the subject seeks to ease his tax burden by deducting outgoings from his taxable income, but the underlying principle is the same in both cases: "(Income tax) does not tax capital. As a corollary to that, in ascertaining profits, payment of a capital nature may not be deducted" (per Sir Wilfrid Greene, M.R., in *I.R.C.* v. *British Salmson Aero Engine, Ltd., supra*).

The distinction between the two classes of profit and expenditure begs, of course, the fundamental question of what is taxable "income," and Lord Moncrieff admits that "the differentiation in any particular case of profit as resulting in capital appreciation on the one hand, or on the other in accruer of income may be expected to introduce questions of difficulty." The dividing line between income and capital was most clearly established in an American authority, the judgment of the Supreme Court of the United States in *Eisner* v. *Macomber* (1919), 252 U.S. Rep. 189, and various dicta by Pitney, J., in that case were quoted with approval by Lord Finlay, in *I.R.C.* v. *Blott* (1921), 2 A.C. 171. The relevant passage from his Lordship's speech runs thus: "Income derived from property is 'not a gain accruing to capital,' not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested or employed, and coming in, being 'derived,' that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal." Sankey, J. (as he then was), in *Pool* v. *Guardian Investment Trust Company* (1922), 1 K.B. 34, also quoting *Eisner* v. *Macomber, supra*, said: "The words capital, income and assets may have different legal and popular meanings, but the duty under Schedule D is a duty chargeable on profits or gains, and not upon capital. As Mr. Justice Pitney points out (in *Eisner* v. *Macomber*), the fundamental relation of capital to income has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop." This metaphor has since been frequently applied in distinguishing capital from income: see *Ryall*

v. *Hoare, supra*; *Lowry* v. *Field* (20 T.C. 679); *Trustees of Earl Haig* v. *I.R.C., supra*; *Leader* v. *Counsell* (1942), 1 All E.R. 435. Instead of using a metaphor, however striking, it is perhaps more helpful to apply the definition quoted by Sankey, J. in *Pool* v. *Guardian Investment Trust Co., supra*, from *Eisner* v. *Macomber*: "Income may be defined as the gain derived from capital, from labour, or from both combined, and the essential matter is that income is not a gain accruing to capital but a gain derived from capital."

Having these observations in mind, we can now approach the charging sections of the Income Tax Code. Schedules A, B, C and E are self-explanatory, so far as our problem is concerned. It is the residual Schedule D which has given rise to much controversy. Schedule D charges, *inter alia*, "the annual profits or gains arising or accruing from any kind of property whatever," and it then specifies six "Cases," under which tax within the scope of the Schedule is to be charged. When the "Cases" are examined, it will be found that there is no further reference to "profits arising or accruing from any kind of property." Under the "Cases" tax is charged "in respect of" various sources, namely, trade—Case I; profession, employment, or vocation—Case II; interest, dividends, annuities, discounts—Case III; income from foreign securities—Case IV; income from foreign possessions—Case V. The residual or "sweeping-up" Case VI charges tax "in respect of any annual profits or gains not falling under any of the foregoing Cases." Does this refer back to "profits arising or accruing from any property whatsoever," as mentioned in the general charging words of Schedule D, and can such reference be read into Case VI so as to make accretion or appreciation of capital a taxable "profit arising or accruing from property"? It is now established that Case VI does not so tax accretion to capital (or "capital profits," as such increments are commonly called). *Jones* v. *Leeming* (1930), A.C. 415, is the leading authority for this proposition. In this case the taxpayer had acquired options to purchase rubber estates and had sold them at a profit. It was found by the Commissioners that the taxpayer had acquired the options, not with the intention of holding them as an investment, but with the sole object of turning them over again at a profit. It was held by the House of Lords, affirming the two Courts below, that the profit arising from the transaction was an accretion to capital and not subject to tax under Case VI. In the Court of Appeal, Lord Hanworth, M.R., gave an exposition of the scope of Case VI, which is both concise and lucid: "If you are to apply Case VI, it must be in respect of something to which Schedule D applies; it must be something in the nature of profits or gains in contradistinction to capital. . . . Capital accretion, whatever else may fall within Case VI, does not fall within Case VI, and it is not taxable for the reason that it is not a source." This statement of what is not within Case VI is well supplemented by Lord Dunedin's statement in the same case of what is within Case VI: "The limitations of the words 'profits and gains' were pointed out by Lord Blackburn long ago in the case of *Attorney-General* v. *Black*, L.R., 6 Ex. 308, when he said that profits and gains in Case VI must mean profits and gains *ejusdem generis* with the profits and gains specified in the preceding five Cases." In other words, in order to attract tax under Case VI, profits must be in the nature of, or analogous to, profits such as are gained by the exercise of a trade, profession or vocation, or they must be in the nature of interest for the use of money, or of rent for the use of land.

Lowry v. *Field* (1936), 2 All E.R. 735, is a more recent case on the subject. Here the taxpayers had invested money in options for mining property, and the exercise of the options resulted in the acquisition of shares. They were assessed on the difference between their subscription and the nominal value of the shares. Lawrence, J. held that the profit was of a capital nature and therefore not liable to tax. The reasoning of his judgment demarcates very clearly cases which are mere cases of capital profit from those which have the nature of revenue profit and thus attract tax under Case VI: "I am inclined to think that wherever there is an investment of money there must be a possibility of the profit upon that money recurring for it to be a revenue profit, and where, as here, the particular profit is not a profit which can recur, it is in such a case a profit of a capital nature. In my view that reasoning harmonises with the cases which have held that recurring profits where there is no investment of money may be of a revenue nature, the conception being that the capital nature there involved is nothing more than the individual's efforts, and the individual's efforts always being capable of recurring, the profit which is so derived from the individual source is treated as being a casual profit which may fall under Case VI." Lawrence, J. is alluding to the case of *Cooper* v. *Stubbs* (1925), 2 K.B. 753, where the Court of Appeal held (by a majority) that profits arising from dealings in "cotton futures" were taxable under Case VI. In *Cooper* v. *Stubbs* it was the making and closing of executory contracts for the future purchase or delivery of cotton which resulted in gains. There was no capital investment, and therefore no capital profit, and the particular activity of making and closing contracts was something analogous to trading, although it had been found as a fact that it did not constitute a trade within Case I. The individual's efforts involved (to use the language applied by Lawrence, J.) may also be analogous to the exercise of a profession, or may be in the nature of an employment, and where this results in profit, albeit casual, this profit is subject to tax under Case VI: see the recent case of *Hobbs* v. *Hussey* (1942), 1 All E.R. 445.

Having established the rule that "capital profit" is not a source of income within the scope of the Income Tax Code and therefore not taxable, we at once observe that this statement is subject to a most important qualification. The accretion of capital becomes a taxable profit if it results from trade. "The circumstance that the profit is due to an accretion in the value of the article does not negative the application of income tax, because the accretion of value to the article may have been the very thing that a trade within Case I was established to secure" (per Rowlatt, J., in *Rees Roturbo Development Syndicate* v. *Ducker*—13 T.C. 366). But this qualification needs further qualification. Not every capital profit in the hands of a trader is taxable trading profit. It must be profit arising or accruing from a trade, not just profit arising or accruing to a trader, or to put it in more technical terms, the source of the taxable income is the profit arising from the exercise of a trading activity, not the profit from capital as such. It is obvious that a trading concern may have capital which is not directly employed in the carrying on of its trade, e.g. business premises, office furniture, investments, etc., and any profit from an appreciation of value of such assets would not be taxable income. To put it in the shortest possible way: in the case of a trader we have to distinguish between the assets with which he trades, and those in which he trades. The economists have termed these two sets of assets "fixed capital" and

"circulating capital," and these terms have found judicial recognition. Lord Hanworth, M.R., said in *Mallett* v. *Staveley Coal & Iron Co.*—13 T.C. 772: "One has to keep clear in one's mind that in dealing with any business there are two kinds of capital, one the fixed capital which is laid out in the fixed plant, whereby the opportunity of making profits or gains is secured, and the other the circulating capital, which is turned over and over in the course of the business which is carried on." And again (in the same case): "One must separate the sum employed in the purchase of the business from the sum employed in the carrying on of the business, or otherwise the circulating capital." The rule can be stated thus: Profits arising from the accretion of fixed capital (commonly called "capital assets") are not a source of taxable income, profits arising from the accretion of circulating capital are. Conversely, it may be noted here, expenditure made in respect of fixed capital or "capital assets" is not a proper deduction from trading profits, while expenditure made in respect of circulating capital, or in other words, made for the purpose of trading, generally is. The application of this rule is complicated by reason of the fact that no particular asset is imprinted once and for all with the character of "fixed" or "circulating" capital.

Fixed capital may be converted into circulating capital, and vice versa, according to the vicissitudes of the business. A business may start with or without fixed capital. The latter case may occur "where the whole capital of the concern is put into property, and the whole object is to sell that property at a higher price; and if the accretion of value comes about, it affects the assets of the whole capital and it is profit of trading in the clearest possible way" (per Rowlatt, J., in *Rees Roturbo Development Syndicate* v. *Ducker, supra*). On the other hand, a business may withdraw its circulating capital from active trading either partially or completely.

A very good example of a partial withdrawal of circulating capital is afforded by the case of *Beams* v. *Weardale Steel, Coal & Coke*—21 T.C. 204. Here a company originally trading as colliery owners and steel manufacturers had acquired and added to slag heaps while carrying on business as steel manufacturers. After they had ceased to trade as steel manufacturers, but while they were carrying on the trade of colliery owners, they sold the slag heaps. The Commissioners found that the receipt from this sale was a capital receipt, and not trading income, and therefore not subject to income tax, and they were upheld. It appears that the particular asset, the slag heaps, which had been circulating capital as long as the company had been trading as steel manufacturers, was converted into fixed capital as soon as this trade ceased, because it was no longer "employed in the carrying on of the business" (to quote again Lord Hanworth, M.R., in *Mallett* v. *Staveley Coal & Iron Co., supra*).

In *Beams* v. *Weardale Steel, Coal & Coke Co.*, the partial liquidation of the business resulted in a capital profit, but we have also to consider the converse case of a partial liquidation or sterilization of business resulting in capital loss. Good examples of this class of case are to be found in *Mallett* v. *Staveley Coal & Iron Co.* (*supra*), followed more recently in *Union Cold Storage Co.* v. *Ellerker* (1938), 4 All E.R. 692. In both cases the taxpayers made a payment to a lessor in consideration of his accepting the surrender of the lease "in order *pro tanto* to go out of business" (per Rowlatt, J., in *Mallett* v. *Staveley Coal & Iron Co.*), and it was held that this expenditure was made, not for the purpose of trading, but in respect of fixed capital, and that it was therefore not a proper deduction from

trading profits. Payments of such a nature are commonly called "capital" payments as distinct from trade expenses, which are called "revenue" payments. These are very convenient terms as long as it is understood that, while both kinds of payment relate to capital, the so-called "capital" expenditure is related to fixed capital and the so-called "revenue" expenditure to circulating capital. Lord Sands, in *C.I.R.* v. *Granite City Steamship Co.* (13 T.C.1), puts it thus: "Broadly speaking, outlay is deemed to be capital (expenditure) when it is made for the initiation of a business, for extension of a business, or for a substantial replacement of equipment." Taking cases like *Mallett* v. *Staveley Coal & Iron Co.* into account, we may amplify Lord Sands' statement by adding the words "or for the liquidation of a business."

Yet another case of a partial liquidation of a business occurs where trading contracts are cancelled, and the question arises whether a sum received by a trader as compensation for loss of trade is to be regarded as a capital or a revenue receipt. In Lord Moncrieff's words (*Kelsall Parsons & Co.* v. *C.I.R.*—22 T.C. 608): "this must depend upon the particular circumstances under which the payment has been made." His Lordship then refers to a distinction drawn in previous authorities between two kinds of contract, namely (1) a contract made by a trader which is merely directed to result in trading profits being made, and (2) a contract made by a trader which is directed "to regulate the conditions under which he is to carry on his trade." In His Lordship's opinion the disturbance of a contract of the latter class "may be a disturbance of what should properly be regarded as a capital interest." We cannot fail to recognize that a contract of the latter type is in reality a "capital asset," i.e. fixed capital, while a contract of the former type is part of a trader's circulating capital. In *Kelsall Parsons & Co.* v. *C.I.R.* (*supra*), the taxpayers carried on business as agents for various manufacturers. One of their agency agreements was terminated in consideration of a compensation for loss of profits. The payment was held to be a taxable profit. In *Chibbett* v. *Joseph Robinson & Sons*, 9 T.C. 48, the taxpayers were employed as ship managers to a steamship company, their remuneration consisting partly of a percentage of the company's profits, including interest on its investments. On the liquidation of the company the taxpayers received a sum in compensation for loss of office. Here it was held that the payment was not a taxable profit. Rowlatt, J., said: "It seems to me that a payment to make up for the cessation for the future of annual taxable profits is not itself an annual profit at all." Perhaps it is permissible to paraphrase this dictum by saying that compensation paid in respect of the loss of potential earning capacity relates to fixed capital and is therefore not a taxable profit. The arrangement in *Chibbett* v. *Robinson* would seem to fall within class (2) of contracts in Lord Moncrieff's classification. By contrast, *Kelsall Parsons & Co.* v. *C.I.R.* was a case where compensation was paid for the loss of a profit which would have been a trading profit, if it had been earned; the compensation in lieu of such a profit partakes of its nature and is therefore a taxable profit.

We now turn to the case of a complete withdrawal of the circulating capital from active trading. This occurs normally where a business realises its assets for the purpose of liquidation. Much litigation has arisen over the question whether the profit accruing from the realization of assets is taxable income or capital accretion. In a recent case, *C.I.R.* v. *Nelson* (1930, S.C. 689; 22 T.C. 716, the taxpayer, a whisky broker, was desirous

of retiring from business. After having notified his creditors and customers of his intention, he sold his stock-in-trade, trade name, office furniture, etc., to one of his customers. The Special Commissioners found that the sale was a transaction entered into after trading had ceased and was a realization of assets not in the course of trade. The Inland Revenue maintained that a realization sale of stock-in-trade by a trader whose business is simply one of purchase and sale must always be a sale in the course of trade and that the sale in this case was in substance and reality a sale of the stock-in-trade merely. The Lord President in his opinion said: "Sale of a stock-in-trade such as whisky on realization may be either a sale in the course of trade, or a sale not in the course of trade, according to circumstances, and the Special Commissioners here had evidence on which they were entitled to hold that the sale was not a sale in the course of trade." This case contrasts with *J. & R. O'Kane & Co.* v. *C.I.R.*, 12 T.C. 303, where taxpayers who carried on business as wine and spirit merchants decided to retire from business and offered their stock to regular customers by sending price lists which contained an intimation that the business was going to be wound up. Here the Special Commissioners found that the trade was still carried on and that the profit made by the sale of the stock-in-trade was made in the course of trade and thus taxable income, and they were upheld. In *Wilson Box (Foreign Rights), Ltd.* v. *Brice*, (1936) 2 All E.R. 452; (1936) 3 All E.R. 728 (C.A.), Lawrence, J. stated the salient point very clearly, thus: "It is clear that the liquidator of a company may realize the assets of the company without carrying on the business of the company in such a way as to attract Income Tax. The only question is: How were the assets liquidated? Did that form of liquidation involve the carrying on of a trade by the liquidator or the company?" Lord Moncrieff's opinion in *Trustees of Earl Haig* v. *C.I.R.* contains the following passage: "If persons who are proprietors of an article with which it would be open to them to deal as traders, yet do not do so, it appears to me that any non-trading dealing with the article . . . which enables its value to be realized, can only be a dealing with the article on capital account." Whether the realization of an asset occurs in the course of trade is eminently a question of fact for the Commissioners to determine, and the question of law whether the profit is taxable income will be determined accordingly.

We have now to consider the application of the principles set out above to trade expenditure. A trader's disbursements may be occasioned by his trade, or, in the words of Rule 3 (*a*) of the Rules applicable to Schedule D, Case I and II, "Wholly and exclusively laid out or expended for the purpose of the trade." On the other hand, a disbursement may represent "capital withdrawn from, or any sum employed or intended to be employed as capital in such trade" (Rule 3 (*f*), *supra*). Generally speaking, expenditure of the former class is deductible from taxable profits, expenditure of the latter class is not so deductible. It is now established, however, that the question rests on broader grounds. For our present purposes it is sufficient to quote Lord Sumner's well-known statement in *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, (1915) A.C. 433: "A deduction is to be made or not to be made according as it is or is not, on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of profits of it." The fact alone that money is wholly and exclusively expended for the purposes of the trade is not sufficient to make such payment a "proper debt." To be

charged against incomings of the trade a payment must have the nature of a "revenue or income" payment, or in other words, it must be such expenditure as is necessary to earn the income against which it is to be charged. On the other hand, a trader's expenditure in respect of his trade which is not "revenue" expense is called "capital expenditure," and its nature has been defined most succinctly by Lord Cave, L.C., in *British Insulated & Helsby Cables, Ltd.* v. *Atherton* (1926), A.C. 205, in these words: "Where an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason for treating such an expenditure as properly attributable not to revenue, but to capital." When we remember the quotation from Lord Sands' judgment in *C.I.R.* v. *Granite City Steamship Co.* (above) we shall be able to recognise that expenditure relating to or creating fixed capital is not a proper debit item to be charged against trade incomings, while expenditure relating to or creating circulating capital is properly deductible, save for the express prohibitions enumerated in the Rules to the Schedules.

The practical application of the principle is well illustrated by a trilogy of cases, namely: *Scottish North America Trust* v. *Farmer* (1912), A.C. 118; *European Investment Trust Co.* v. *Jackson*, 18 T.C. 1; *Ascot Gas Water Heaters, Ltd.* v. *Duff* (Tax Leaflet No. 1156). In *Scottish North America Trust* v. *Farmer*, a company's main business was to buy and sell investments. As their purchases exceeded the amount of their available cash, they borrowed money and pledged securities for the overdraft. It was held that the borrowings were not sums employed as capital within rule 3 of the First Case of Schedule D and that the interest paid on the overdraft was deductible as an outgoing for the purposes of the business. Lord Johnston (in the Court of Session) said: "It may well be said that if money is borrowed on a permanent footing, as from year to year, the capital of the concern is in a commercial sense enlarged thereby, and the business extended, whereas no commercial man would consider that his banking facilities were part of his capital, or the consideration he paid for them anything but an expense of his business." *European Investment Trust Co.* v. *Jackson* provides an example of what Lord Johnston called an enlargement of capital. Here a company's main business was the advancing of money for the acquisition of motor cars on the hire-purchase system. The company was in turn financed by another company which advanced money, as and when required, to finance fresh hire-purchase transactions. The Commissioners disallowed the deduction of interest paid to the financing company on their advances, holding that such advances were monies employed as capital in the trade, and they were upheld. Finlay, J., stated the principle in this way: "If you get a company dealing with money, and if you get that company getting temporary loans, then the interest on that money may properly be regarded as an expenditure of the business, an outgoing to earn the profits. On the other hand, if the truth of the thing is that by the payment of the interest the company does not obtain mere temporary accommodation, but does, in truth, add to its capital and gets sums which are used as capital and nothing else, then I think that in that case all the authorities show that that deduction cannot be properly made." In this case the arrangements between the taxpayer and the financing company were, to borrow a passage from Lord Macmillan's speech in *Van den Berghs, Ltd.* v. *Clerk* (1935), A.C. 431, "the fixed framework within which their circulating capital operated.

they were not incidental to the working of their profit-making machine, but were essential parts of the mechanism itself." To put it quite shortly, the arrangements represented fixed capital, and it does not matter that the fixed capital happened to be borrowed capital.

The recent case of *Ascot Water Heaters, Ltd.* v. *Duff* provides a synthesis of the two cases just mentioned, because we find here expenditure relating to fixed capital and expenditure relating to circulating capital conveniently dealt with side by side. A company purchased raw materials abroad on nine months' credit. A guarantee for the indebtedness was demanded by the creditor and obtained from a company abroad. At the same time the company borrowed fresh money for the expansion of the business, and these borrowings were secured by the issue of debenture stock, its service and repayment being guaranteed by a bank. The company claimed deduction of the commission paid to the guarantors in both instances. It was held that the commission paid in respect of the guarantee for the trade indebtedness incurred abroad was a trade expense and therefore deductible, but the commission paid in respect of the guarantee for the debenture stock was a capital payment and not a proper debit against trade profits. Lawrence, J., quoting with approval Finlay, J., in *European Investment Trust* v. *Jackson*, said: "The principle was whether the sums in respect of which the commission was payable were sums which, although capital, were temporary in their nature and might be regarded as an ordinary incident of carrying on the business of the company." His Lordship then held that there was evidence on which the Commissioners could base their finding of fact that the first of the guarantees was given with a view to paying off an existing trade debt more speedily, and that the expenses connected with this guarantee were for this reason a proper debit on revenue account. It will be seen that this expenditure related to capital which was dedicated to active trading, in other words, to circulating capital. The guarantee for the debenture stock, on the other hand, was held to be not so related, but was evidently required to obtain fixed capital, and the position was therefore similar to that in *European Investment Trust* v. *Jackson*.

Whether in any given case outgoings are of a capital or revenue nature depends very much on the facts as found by the Commissioners, and it is useful to keep in mind what Scott, L.J., observed in *I.R.C.* v. *British Salmson Aero Engine, Ltd.*: "In so far as the Special Commissioners are skilled persons in matters of business, if they come to the conclusion as business men that a particular payment has the accountancy quality of a capital payment or an income payment, that is a view to which, in my opinion, the Court is entitled to give great weight." But it must also be remembered that book-keeping as such is not conclusive in the matter. "Traders frequently prefer to debit to revenue account payments which are in their nature proper to be carried to capital account. If they do so, it means nothing more than that they have a conservative taste in the matter of accountancy" (per Lord Greene, M.R., in *Henriksen* v. *Grafton Hotel, Ltd.*, (1942) 1 All E.R. 678).

R. Lachs.

THE ADMINISTRATION OF THE WORKMEN'S COMPENSATION ACTS[1]

I have read with some interest Mr. Hammond's contribution to the July issue of THE MODERN LAW REVIEW.

Having regard to the proposals of the Beveridge Report, I hope that many of the matters to which he refers will shortly become of historical interest only, but as one who was largely responsible for the drafting of the Labour Party Bill on Workmen's Compensation to which he refers, I am mildly surprised that a gentleman who writes as an authority on workmen's compensation law, should state that he has been "unable to read anything" about the New Zealand and Canadian schemes. If he wants to study them, he should have no difficulty in getting copies of the schemes and also of the Annual Reports of the Commissioners.

For the reason stated above, I refrain from detailed comment on Mr. Hammond's contribution, but as a practitioner on the workmen's side with many years' experience of the administration of workmen's compensation law, I wish I could accept his Panglossian view of the world of workmen's compensation.

Unfortunately I have seen too many of the human tragedies involved —many of them the result of the system—to adopt such a detached view. It is my considered opinion that even "an average profit ratio of 2½ per cent" is too much to pay for the doubtful benefit of commercial insurance in the administration of workmen's compensation. I welcome wholeheartedly the Beveridge proposals as the end of a scheme of things which made it possible for profits (however small), and whether insurance, legal or medical, to be made out of the "blood and sweat" of the workers.

A. RUSSELL JONES.

NOTES OF CASES

Formation of Contract—Lack of *Animus Contrahendi*

Upton-on-Severn R.D.C. v. *Powell*, [1942] 1 All E.R. 220, is a case for a students' moot, and if the students were to sit as the "House of Lords" one feels that the decision of the Court of Appeal would stand a good chance of being "reversed." The defendant's farm was in the Upton police district, but in the Pershore, and not the Upton, fire district. Thus he was entitled to the services of the Pershore fire brigade without charge, but not to those of the Upton fire brigade. A fire broke out on his farm, and the defendant telephoned to the police inspector at Upton and asked for the fire brigade to be sent. The inspector naturally summoned the local Upton fire brigade. Apparently he and the defendant and the Upton brigade thought that the farm was in the Upton fire district. The Upton brigade arrived and put out the fire. The Upton R.D.C. now sued on an implied contract for remuneration. It was held by the Court of Appeal, affirming the county court judge, that it was entitled to recover.

[1] We have received this note from a reader commenting on the subject of Mr. L. E. Hammond's article in our issue of July, 1942.—ED.

It is astonishing that the Court found itself able thus to "imply" a contract that was not intended by either party. Had the error been confined to the defendant the case would have been easy enough. Having regard to the fact that the defendant telephoned the Upton inspector, and that the Upton inspector summoned the Upton brigade, it was reasonable for the Upton brigade to suppose that they had been summoned on behalf of the defendant; and in fact the defendant apparently intended that they should be summoned. Thus if the Upton brigade had realised that they were acting outside their area, and had intended to charge for their services, the mistake of the defendant, unknown to the Upton brigade, would have been immaterial. The difficulty arises from the fact that the Upton brigade shared the defendant's mistake, and thus had no intention to charge when they performed the service. On what theory of contract a contract can be said to have existed in these circumstances is difficult to see.

An analogy may make the legal issue clearer. Suppose that a householder makes a present of a cake to a hungry tramp, being moved thereto by the belief that the tramp has no money; and suppose that the tramp receives the cake as a gift but actually has money and would have been willing to pay for the cake if he could not have got it for nothing. Surely the last-mentioned facts do not create an implied contract to pay for the cake. Likewise in the instant case, the Upton brigade intended to make a present of its services, and the defendant received the services as a present (or, anyway, as due as of right—does this make any difference?). The Upton brigade, like the householder, would not have intended to confer the benefit gratuitously but for its mistake as to the surrounding facts. But on principle the most that this mistake can do is to vitiate the intention to make the gift (it is very doubtful whether it does even that); surely it cannot create a contract.

It it interesting to speculate whether the defendant would be liable to pay for the services as a matter of quasi-contract if we had a developed theory of quasi-contract (which we have not). There are several difficulties in the way of imposing liability even on the broad principles of quasi-contractual liability recognised in Roman law and on the Continent. The civilian theory, as I understand it, draws a sharp distinction between *negotiorum gestio* and the *condictio* for unjust enrichment. In *negotiorum gestio* the plaintiff gets expenses and sometimes reasonable remuneration for work done. The *condictio* may not be so favourable to the plaintiff, for this claim is limited to the amount of the defendant's unjust enrichment. If the plaintiff has laboured on the defendant's behalf without adding to the defendant's riches or saving him expense, he gets nothing. Moreover, he must show that the defendant's enrichment is "unjust."

Now the doctrine of *negotiorum gestio* would not give the Upton R.D.C. an action against the present defendant, because the Roman doctrine was confined to cases where the *gestor* acted without authority, and also was excluded if the *gestor* did not intend to claim compensation from the defendant at the time when he did the work. These rules are reproduced in modern French and German law. On the civilian theory we are thus left with the *condictio* for unjust enrichment as the only possible form of action. But before this lies we must be able to say (1) that the defendant has been enriched, and by how much, and (2) that the enrichment is unjust. As to (1), wherein does the enrichment consist? The plaintiffs did not add to the value of the defendant's farm. They perhaps saved

the farm from destruction, but of course this cannot be the measure of their compensation; they cannot get the value of the farm buildings saved. Besides, what if their efforts were wholly unavailing; does that mean that they will get nothing? But if they get something, we come back to the question what is that something based upon. They did not save the defendant expense, because if the Upton brigade had refused to come the defendant would undoubtedly have telephoned the Pershore brigade, and he would have got its services for nothing. We come to this, therefore, that the defendant can be regarded as "enriched" only if the services of the Upton brigade are regarded as valuable in themselves, irrespective of their effect upon the defendant's fortune. Whether this is the sort of enrichment that falls within the scope of the *condictio* I must leave it to the civilians to decide.

There are more problems upon question (2), whether the enrichment was "unjust." Does it matter that the Upton brigade intended to act without payment? If the Upton brigade can charge for a service that it intended to give free, can the householder in the case I put above charge for the cake that he intended to give free? The answer to the last question is surely "No." Is there, then, any difference (and if so what) between the householder and the Upton brigade? Again, is the justice of the matter affected by the fact that the defendant could have got the services of the Pershore brigade free? If Upton has a remedy in quasi-contract, is it not rather against Pershore (who have been saved petrol and trouble) than against the defendant in this case?

I ask these questions not because the answers to them are of importance in present English law but in order to indicate the difficulty of the terrain that must be charted if English law is in the future to attain a satisfactory theory of quasi-contract.

Contract—Effect of War Conditions

A crop of minor cases illustrating the effect of war conditions on contracts may be shortly noticed. Two turn on the requisitioning of premises. In *Swift* v. *Macbean*, [1942] 1 K.B. 375, the premises requisitioned were let on an equitable lease, and Birkett, J., held that the lease was not "frustrated" (may we say, discharged for failure of consideration?) by the requisitioning. Clearly a legal lease would not have been discharged on this ground, and as equitable leases are commonly relied upon as if they were legal leases, it would be inconvenient to draw a distinction between them. This was not exactly the ground on which Birkett, J. rested his opinion; the reason that he gave was that a chattel interest was vested in the tenant by virtue of the agreement. This reason, however, begged the question, because the continuation of the tenant's chattel interest in equity depended upon the continuation of an enforceable agreement for a lease, and the question before the Court was whether or not this agreement was discharged.

The other requisitioning case is *Cook* v. *Taylor*, [1942] 2 All E.R. 85, where there was an agreement for the sale of premises with vacant possession on completion, and before the date fixed for completion possession was taken by the requisitioning authority. Simonds, J., held that the purchaser was discharged, presumably for failure of consideration. It seems clear that the decision turns on the fact that the contract provided for vacant possession; had there been no such term, express or implied,

the general rule would probably have applied that the premises are at the purchaser's risk after the contract is made.

Egham & Staines Electricity Co. v. *Egham U.D.C.*, [1942] 2 All E.R. 154, is another case that turns upon the construction of the particular contract. The question was similar to that in the *Leiston* case, [1916] 2 K.B. 428, namely whether an urban authority was bound to pay the full sum due under a contract for public lighting, notwithstanding the black-out restrictions, which made the lighting of street lamps illegal. It was held that the question was governed by the contract itself, which provided that in the event of failure to supply light due to "unavoidable cause" the payments were to abate.

In *Re an Arbitration between Sea & Land Securities, Ltd., and William Dickinson & Co., Ltd., The Alresford*, [1942] 1 All E.R. 503, charterers during the currency of a time charter suggested to the owners that the ship should be fitted with degaussing apparatus, and this the owners did. It was held that the charterers were not excused from payment of hire during the time when the ship was thus removed from their use. There was no breach of contract by the owners, since the charterers had themselves suggested that the apparatus be fitted. The case suggests a speculation. Does it mean that an employer who tells his employee to take a week's holiday is liable to pay wages during the holiday? This may seem at first sight a somewhat remote analogy, but where is the difference in principle?

Assignment—Necessity for Consideration

Holt v. *Heatherfield Trust, Ltd.*, [1942] 1 All E.R. 404, in which Atkinson, J., decided one of the most obscure points in the law of assignment without seeming to see any very great difficulty in it, calls for a leading article rather than a case-note, and in fact it has been dealt with in a leading article in the January number of the *Law Quarterly Review*, from the pen of Mr. R. E. Megarry. It is therefore only necessary for us to record without comment the learned judge's decision that no consideration is necessary for the equitable assignment of an existing legal chose in action.

Contract for Personal Services—Impossibility of Performance

Unger v. *Preston Corporation*, [1942] 1 All E.R. 200, raised once again the troublesome question of the discharge of a contract of service owing to impossibility of performance by the servant. The plaintiff, a German refugee, was engaged by the defendants before the outbreak of the war as a medical officer. The engagement was determinable by three months' notice. In June, 1940, he was interned as an enemy alien. While he was so interned the defendants notified him that they considered that his engagement had been terminated by his internment and they followed that up by a letter to the plaintiff giving him three months' notice to terminate his appointment if it had not—as they contended that it had —been already terminated by his internment. The plaintiff was released in March, 1941, after the period of the notice had ended, and brought this action for his salary from the beginning of his internment until the expiry of the three months' notice. Cassels, J., held that he was not entitled to recover.

It is submitted that there were two possible ways in which this conclusion might have been reached. The learned judge confined himself to one of them, but it is convenient in this note to explain the other first.

(1) The first way would have been to draw a distinction between the discharge of the defendants during the period of impossibility of performance by the plaintiff (i.e. his internment), and the discharge of the defendants after the impossibility has ceased. Whether the defendants are discharged from their obligation to pay wages during the period of the internment would depend, on this view, upon whether there is a failure of consideration for the promise to pay, and this in turn would depend upon whether the consideration for their promise to pay is the actual performance of work or the mere readiness and willingness of the servant, if of ability, to perform. The authorities on this question are in a most difficult state (they are collected in McElroy, *Impossibility of Performance*, p. 85, n. 3), and it is impossible to forecast with confidence whether the court in any particular case will take the one view or the other. If the court decides that the consideration is the actual performance of work, it seems reasonable to say that the discharge of the master if work is not performed is "automatic," i.e. he need give no notice to the servant that he elects not to pay wages during the period of the impossibility. Turning to the next question, the discharge of the master[1] after the impossibility has ceased, this again is a question of failure of consideration (though it is commonly called "frustration"), but nevertheless it is not the same kind of failure of consideration as the first, and the legal problem is different. The legal problem here is whether the delay caused by the impossibility is so great or is likely to be so great that it is reasonable to regard the master as discharged from his obligation altogether, and not merely discharged during the continuance of the impossibility. It seems that a master may be discharged on this ground even though, on the first question, the court takes the view that the consideration for the master's promise was the mere readiness and willingness of the servant to perform if of ability to do so. But Dr. McElroy maintains, and I think rightly, that this sort of discharge ought not to be regarded as "automatic," i.e. it ought to depend upon one party or the other expressing his election to treat the contract as at an end (*op. cit.*, pp. 221–31).

Now the case under consideration might have been decided in favour of the defendant according to the above principles. It might have been held that the consideration for the defendant's agreement to pay the salary was the plaintiff's actual performance of work, that as, during his internment, the plaintiff did no work, there was a failure of consideration for this period, and consequently that no wages were due. If the learned judge had held this, the second question (as to the discharge of the defendants after the internment ceased) would not have arisen, because the defendant's notice to terminate the service had expired before the plaintiff was released.

However, the learned judge did not decide the case in this way. He decided it in the second of the two possible ways.

(2) This second way is to advance the point of time at which "frustration" (discharge for delay) is regarded as commencing. From the point of view just considered, "frustration" is important only after the physical impossibility has ceased. But from the present point of view a contract

[1] A similar problem may arise with regard to the discharge of the servant, but that does not concern us here.

may be regarded as discharged for frustration even while the physical impossibility of performance (the internment in this case) is continuing. For this there is ample authority. "Commercial men," said Scrutton, L.J., "must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by a contract or not; they must be entitled to act on reasonable probabilities at the time when they are called upon to make up their minds": *Embiricos* v. *Reid*, [1914] 3 K.B. 45 at 54 (and see other authorities in McElroy, pp. 173–4). This means that discharge for frustration may occur before the delay has ended. The question in that case is one of probability: is it probable that the delay will be so long as to make it reasonable to regard the party as discharged?

This was the question that Cassels, J., applied to the instant case. Following *Horlock* v. *Beal*, [1916] 1 A.C. 486, and *Marshall* v. *Glanvill*, [1917] 2 K.B. 87, and distinguishing *Nordman* v. *Rayner* (1916), 33 T.L.R. 87 (where "it was doubtful from first to last whether [the internment] would last for any substantial period"), he held that the internment "frustrated the business purpose of the contract between the parties," and therefore that the defendant's duty to pay wages ceased from the moment of the internment.

It will be seen that this way of deciding the case absolved the learned judge from going into the question of what was the consideration for the defendants' promise to pay wages. It will be seen, too, that it involved a question as to the automatic effect of frustration. The plaintiff's internment took place on 25th June, 1940. The earliest intimation by the defendants to the plaintiff that they considered the contract as at an end took place in September of the same year. Yet the learned judge held that the defendants were under no duty to pay wages during this period, June–September. He came to this conclusion without inquiring whether the consideration for the defendants' promise to pay was service or the readiness to serve. If this decision is correct, it means either that frustration has an automatic effect or that a valid election to treat the contract as frustrated, when made, is retroactive to the earliest time at which the election could properly have been made (i.e. in this case, to the internment).

It is submitted that it would be unfortunate if either of the latter rules were to be finally incorporated into the law. To illustrate the objection to them, let us suppose that A engages B for five years, and expressly agrees to pay wages during illness. This agreement means that the consideration for A's undertaking to pay wages is B's readiness to perform if well enough to do so. Probably the wording of the agreement does not exclude the law of frustration, and thus A may claim to be discharged from his promise if B falls so seriously ill that the object of the agreement is frustrated. Let us suppose then that B falls ill with tuberculosis. A, if he likes, can at once declare that he regards the contract as at an end. But suppose that A does not do so. Perhaps he hopes that B will make a comparatively speedy recovery, and is anxious to retain his services if he can. In answer to a request from B to know whether the engagement still stands, A replies that he cannot say, and that he reserves all his rights. Also, A refrains from paying B wages. Two years later, B is again fit for work and presents himself to A. A now announces that the contract is discharged for frustration, that the discharge operates from the moment of B's illness, and that therefore no wages are payable from that moment.

The courts need to consider much more carefully than they have done what is the convenient rule for a case like this. With respect I submit that a rule that enables one party to hold the other in suspense as to his intentions is not convenient. If A wishes to postpone his decision whether to treat the contract as frustrated or not he should be able to do so, but only at the price of fulfilling his contractual obligations in the meantime, and paying B wages during illness. The contract provides for wages during illness, and B should be entitled to them until such time as A validly declares that the contract is at an end.

It seems to me that the unthinking acceptance by the Courts of the proposition that frustration is automatic is the result of the ambiguity of the term "frustration." There are forms of frustration, in its widest sense, that are automatic, but it ought to be recognised that frustration in the sense of discharge for inordinate delay is not automatic, but depends upon the election of one party.

The decision in *Unger* v. *Preston Corporation* is not necessarily open to the above objection; we cannot tell whether or not it is open to the objection because the learned judge did not decide whether, apart from discharge for inordinate delay, salary would have continued payable during the internment. If it did, I respectfully submit that it ought to have continued payable until the date when the defendants disaffirmed.

GLANVILLE WILLIAMS.

The Meaning of "Money"

By its decision in *Re Morgan* (1943), 1 All E.R. 187, the House of Lords has provided renewed and most welcome proof of the progressive spirit which has animated the highest tribunal in recent years. It would not be difficult to enumerate a long series of reforming decisions re-establishing or introducing rules of law which often revolutionised the particular sphere of law concerned and almost invariably resulted in relieving, as Lord Atkin said, "judges in the future from the thraldom, often I think self-imposed, of judgments in other cases." Among these decisions, *Re Morgan* will hold pride of place for three reasons.

1. In the first place the decision relates to the interpretation of the word "money" in a will. It finally disposes of the doctrine which Lord Greene in the Court of Appeal and Lords Atkin and Thankerton in the House of Lords had no hesitation in describing as a "blot on our jurisprudence" and according to which the word "money" in a will means money in the strict "legal" sense, i.e. cash in the house and at the bank, unless there is a context sufficient to support a wider interpretation. The new rule is that there is no presumption in favour of a particular narrow meaning of the word, that it is the duty of the Court "to ascertain, without prejudice as between various usual meanings, which is the correct interpretation of the particular document," and that "for the purpose of construing a will and especially a home-made will, a popular meaning" may be more important than a "legal" one. It follows that in future it will be possible to hold without undue difficulty that the single sentence "all the money of which I die possessed" may dispose of the whole of the testator's estate.

This is the rule which the Court of Appeal in the instant case (on whose decision see Benas, VI Mod. L.R. 86) and many previous judges would have liked to follow had they not been prevented by binding

authority from departing from a doctrine which, as Mr. Morris has shown (55 (1939) L.Q.R. 540 *sqq.*), originally rested on slender foundations, but which was firmly established by *Lowe* v. *Thomas* (1854), 5 D.M. & G. 315. That that rule was unjustifiable and that the new rule is alone capable of approval, cannot be doubted and is most impressively shown by the judgment of Lord Greene in the Court of Appeal who, to an extent unsurpassed by any of the other learned Judges, seems to have been conscious of, and emphasised, the social implications of the matter.

It is, however, noteworthy that the two eminent Chancery lawyers who took part in the deliberations of the House of Lords, viz. Lords Russell and Romer, were in favour of retaining the old rule. Both of them, it is true, agreed in allowing the appeal on the ground that in their view Miss Morgan's will contained a context permitting a wider interpretation of the word "money." Both of them also emphasised that established rules of construction should be strictly observed but ought to be applied "in a reasonable way." But they felt that, as Lord Russell put it, so long as the rule "yields to context, it is, as I have said, a kindly rule; and being a rule of long standing which has for many years decided the title to property other than cash in hand, it should not be disturbed."

If it could be expected that the Judges of the Chancery Division would apply fixed rules of construction as liberally and broadly as Lords Russell and Romer did in the present case, the continued existence of the old rule might perhaps have involved no great danger. Things being as they are, however, it certainly is preferable to free them from the fetters to which they are so strongly inclined to cling.

2. Although in so far as the wider aspect of the decision is concerned, Lords Russell and Romer remained in the minority, the opinions delivered by them will have permanent significance in that they provide useful guidance to the problem of construing a will and dealing with rules of construction. These observations deserve particular attention, since they were concurred in by the majority of the House.

In the past there has undoubtedly been "a tendency on the part of the Court to pay more attention to the rules of construction than to the language of the testator" (per Lord Romer on p. 198). The method of approaching a problem of construction often seems to have been that, consciously or subconsciously, the Court started from the rule of construction and then proceeded to ascertain what the language of the will was and whether it displaced that rule. In truth, however, the order should be reversed, and it is only in the last resort that regard should be had to rules of construction. As Lord Romer said, "the Court should not have recourse to this dictionary for the purpose of construing a word or a phrase until it has ascertained from an examination of the language of the whole will, when read in the light of the surrounding circumstances, whether the testator has indicated his intention of using the word or the phrase in other than its dictionary meaning; whether, in other words, to use another familiar expression, the testator has been his own dictionary."

The circumstances on which the Court is to rely in discharging its task of construction, are, as is well known, not unrestricted. But in this connection, too, one cannot help feeling that the House of Lords has perhaps allowed itself some latitude from which others might have recoiled. This is clearly shown by Lord Atkin's dictum that the construing Court is to be guided "by the other provisions of the will and the other relevant

circumstances including the age and education of the testator, the nature of his property at the date of his will, his relation to the beneficiary chosen whether of kinship or friendship, the provision for other beneficiaries, and other admissible circumstances. Weighing all these the Court must adopt what appears to be the most probable meaning. To decide upon proven probabilities is not to guess but to adjudicate. If this is to decide according to the 'context' I am content; but I cannot agree that the Court is precluded from looking outside the terms of the will. No will can be analysed *in vacuo*; there are material surroundings such as I have suggested in every case, and they have to be taken into account."

3. The third and by far the most predominant factor which gives such great importance to the decision in *Re Morgan* is that it invites reconsideration of the twin problems of precedent and law reporting.

It is, of course, true that the principle of precedent as it is known in this country could not exist without law reports, and, moreover, would be useless without complete reports containing a collection of every case of any possible legal moment. Therefore, although on many occasions decisions of great impact have not been reported (an omission which reflects upon the principle of precedent rather than the method of law reporting), it is only natural for the reporter to have cases printed the general importance of which may be doubtful. The effect is that, because of the principle of precedent, such cases are apt to be followed and to harden into authorities. In the instant case, Viscount Simon, L.C., described it as "unfortunate" that so many cases turning on the construction of wills should find their way into the books, "for in most instances the duty of a judge who is called upon to interpret a will containing ordinary English words is not to regard previous decisions as constituting a sort of legal dictionary to be consulted and remorselessly applied whatever the testator may have intended, but to construe the particular document so as to arrive at the testator's real meaning according to its actual language and circumstances." This criticism is undoubtedly justified, but, with great respect, it does seem to put the cart before the horse. Reports of such cases are useful and interesting in many respects, and the reporter who, by omitting a case, may, in effect, be making, or rather unmaking, law, is not to be blamed for giving information and thus leaving it to others to develop the law.

It is the principle of the binding force of precedent which is the root of the trouble, and if ever there was a case which throws doubt on the justification of that principle it is *Re Morgan*. Notwithstanding the fact that the old rule on the meaning of the word "money" had existed for more than 200 years, the House of Lords found it possible to create a more elastic rule, better suited to the requirements and ideas of modern times, and to hold that the case was not one "in which this House is required on the ground of public policy to maintain a rule which has been constantly applied but which it is convinced is erroneous. It is far more important to promote the correct construction of future wills in this respect than to preserve consistency in interpretation." Would it really have been a misfortune if it had been open to the Court of Appeal to adopt a course which by almost universal consent was desirable, necessary, and in fact inevitable, and thus to save the public's money, keep the law flexible and give expression to the policy of an enlightened age? Experience in other countries has shown that the innate conservativism of the legal mind is strong enough to produce a voluntary tendency of following

precedents. The *binding* principle of *stare decisis* as practised in this country demands reconsideration. Judges who continue to be "held in thrall" (Lord Atkin, p. 194) cannot discharge the tasks which the work of reconstruction to be done after the war will impose upon them. This is the great lesson of *Re Morgan*, and, incidentally, of a number of other recent decisions of the House of Lords, of which *Radcliffe* v. *Ribble Motor Services, Ltd.*, 1939, A.C. 215, *Lissenden* v. *C.A.V. Bosch, Ltd.*, 1940, A.C. 412, *Fibrosa Spolka Akcyjna* v. *Fairnbairn Lawson Combe Barbour, Ltd.*, 1943, A.C. 32, and *Summers* v. *Salford Corporation* (1943) 1 All E.R. 68, are perhaps outstanding examples. F. A. MANN.

Foreign Confiscatory Legislation and Private International Law

German legislation, enacted in 1938 (particularly an Act of 3rd December, 1938), authorised the Government to deprive Jewish owners of enterprises of their right of disposition over their property; the unrestricted right of disposition was vested in a Commissar Manager, appointed by the competent Government department. Under a Decree of 19th January, 1939, made under this legislation, one Anton Cerny was appointed by the authorities Commissar Manager of the Tschechoslovak firm of Brothers Boehm, of Neutitschein, a town in the Sudeten Region. The London Branch of the Bank of New Zealand held a sum of about £1300 on account of the firm of Brothers Boehm. The money represented the price of goods bought from the firm by customers. The partners of the firm, after having left Germany, claimed payment of this amount, whereas the Commissar Cerny alleged that, under the German legislation, he was exclusively entitled to receive payment and to give good receipt and discharge for the sum of £1300. Brothers Boehm claimed against the Bank of New Zealand, and Cerny, a declaration that the amount of £1300 was their (the plaintiffs') property, and sought an injunction restraining the bank from paying the money to Cerny or any other person without their consent. The bank took out a summons in which the question was whether the plaintiffs (Brothers Boehm) or the defendant (Cerny) were entitled to receive payment (interpleader issue). Mr. Justice Simonds (Chancery Division) gave judgment in favour of the plaintiffs (as reported in *The Times* on July 26th, 1940). His Lordship held that the Decree of 19th January, 1939, was a confiscatory measure. He (His Lordship) knew of no English case where confiscatory legislation, whether of a general character or of a character directed to a particular class of citizens, had been held to be operative outside the State which enacted the confiscatory legislation; the firm of Brothers Boehm were, therefore, entitled to have the money paid to them. (See *Mann*, "Extraterritorial Effect of Confiscatory Legislation," 5 M.L.R., 262.)

This judgment is in accordance with the statement of Dicey (*Conflict of Laws*, 5th ed., p. 534) that English Courts will not "give any effect in England to disabilities arising from religious vows, from caste, from religious belief . . . or from 'civil death' or infamy." If Warrington, L.J., held, in *A. M. Luther* v. *James Sagor & Co.*, [1921] 3 K.B. 532, "that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction can not be questioned in the courts of this country," stress has to be laid on the words "*within its jurisdiction*," so that Dicey's principle applies with regard to acts done *outside* the jurisdiction of the country concerned.

The same question, as in *Re Brothers Boehm*, was at issue in a case decided by the Court of Appeal at *Zuerich*, Switzerland (1st March, 1939). The Court held that the Commissar Manager appointed by the German authorities for the Viennese bankers M. Thorsch Soehne was not entitled to claim payment of a bank balance held by a Swiss bank for M. Thorsch Soehne, in the first place, on the ground that the application of the respective discriminatory German legislation outside the frontiers of Germany would be in contradiction to public order and to fundamental principles of Swiss Law. The Courts of many other countries have accepted the same ruling.

The *Italian* Courts, however, have taken up the opposite standpoint. Mr. Kurt Eulenberg, who had been deprived of his right to dispose of his publishers' firm at Leipzig, Germany, and who had settled down in London, notified his firm's customers that he and not the Commissar Manager, appointed by the German authorities, was entitled to collect moneys due from Italian customers of the firm. The Commissar asked for a declaratory judgment that payment had to be rendered to him and not to Kurt Eulenberg, and the Court at *Milan*, Italy, gave judgment in favour of the Commissar (4th June, 1940), as reported in the issue of August, 1942, of *Le Droit d'Auteur* (Berne). The Court was of the opinion that, as Kurt Eulenberg had been dispossessed of his enterprise under the German racial legislation, the Commissar alone was entitled to enjoy and exercise all the rights belonging to this enterprise and, therefore, also to claim payment from customers in Italy who had been debtors already before the act of dispossession. The defence put up by the defendant that this German legislation had a purely territorial character and could not be applied outside the German frontiers was dismissed by the Court at Milan.

PAUL ABEL.

REVIEWS

ERRATUM

The quotation in the review of Schwarzenberger's *Power Politics*, by N. Bentwich, published in Vol. V, p. 272, should read, on line 25 *et seq.*—

"At a time when intellectuals not directly engaged in the effort to win the war have swung over from an extreme positivist attitude and adulation of fact-finding to the other extreme of constitution-making, it seems apposite that at least a few concentrate on the not always pleasant task of reading the host of plans committed to patient paper and to digest the multitude of ingenious suggestions into a typology of patterns from which the makers of the coming peace and the bewildered citizens may take their choice."

THE POLLOCK-HOLMES LETTERS. Correspondence of Sir Frederick Pollock and Mr. Justice Holmes, 1874–1932. Edited by M. DE WOLFE HOWE, with an Introduction by SIR JOHN POLLOCK, Bart. In two volumes: No. I, pp. xxiii and 275; No. II, 359, 1942. Cambridge: at the University Press. **36s.** net.

This collection of the correspondence passing over a period of sixty years between two of the foremost lawyers of their age must form a unique

contribution to legal literature. And since the authors were not only great as lawyers but as personalities, and were into the bargain both masters of the pen, the volumes are a store-house of human interest and are bound to claim a very particular niche in the library of every English-speaking lawyer who values his profession at anything more than a tool for money making.

The two men met in 1874 when Holmes was staying in England. He apparently took the opportunity to present to Pollock offprints of articles which he had contributed to the *American Law Review*, and the correspondence begins with letters of thanks from Pollock. Each quickly sized up his opposite number as a man of real distinction in his profession and, what is more, as a person worth knowing for his own sake, so that the epistolary contacts soon began to ripen into a very real, and indeed, considering the small amount of cement which it received from physical meetings, a very remarkable friendship. Holmes, who was at once the more emotional and the shyer of two shy men, every now and then overcomes his reserve and expresses something of what the friendship meant to him, notably when towards the end (1931) he confesses that "it is part of my life," and that he will "die the happier" for the "note of affection" expressed for him by Pollock in 31 *Columbia Law Review*.

To different readers different aspects of the correspondence will make the greater appeal. I confess that to myself the revelation and contrast of personality in the two men is the fascinating and, indeed, the enthralling topic. I find Holmes the more attractive. Perhaps as a result of his terrible experiences in the Civil War, when he was three times wounded, he had a profound understanding of human nature, and without any sentimental illusions about man's inherent goodness a deep sympathy with human difficulties and sufferings. Pollock was not deficient in these qualities, but his approach was so much that of the intellectual that it lacks the warmth of the other.

Holmes also was an intellectual and, judging from these letters, he had fewer personal contacts than Pollock. Indeed Holmes moves chiefly between his study at Boston and his country house and between Washington and his country house. Very occasionally he visits Europe, and from time to time he visits a law school or a legal society to give an address. He seldom, if ever, rubs shoulders with the business men whose disputes take up so much of his working time, while his physical contacts with the industrial proletariat whose liberties he did so much to establish in American law are non-existent. Indeed, he refers with good humoured ruefulness to the attempts which Justice Brandeis made to persuade him to spend part of his vacation in the industrial centres which were the raw material of his legal work.

Pollock, on the other hand, though he cannot have made intimates or even acquaintances easily, had a large number of contacts, and was at home in many cities. He was a passionate traveller, and even after passing his eightieth year indulged himself in expeditions to the Baltic and Mediterranean. Pollock, too, had the Englishman's enthusiasm for sports. He was an eminent mountaineer, and a distinguished fencer though his bookish appearance made this hard to believe. His anxiety about his "return to the Fencing Club" after he had injured his knee at the age of seventy-nine is amusing. Holmes does not appear to have shared these frailties, but he was evidently a great lover of the country and country life, and took a particular delight in flowering trees and

shrubs. He seldom fails to remark upon the burst of cherry blossom when spring reaches New England.

Holmes had supreme confidence in his own ability as a lawyer. He also fancied himself a little in philosophy. Otherwise he was over modest as to his attainments. As a young man he had perhaps had little time for general reading, and certainly gives the impression in his letters of one always trying to catch up. His reading list, as shown in his letters, gives him nothing to be ashamed of, and would make a good general course for any energetic reader—at eighty-nine, for example, he embarks upon Thucydides in the original! His admiration for Pollock's superior attainments as an omnivorous reader appears again and again, though towards the end there is a rival in the shape of Harold Laski, "diabolically clever and omniscient." Pollock indeed bears his enormous erudition with ease throughout these pages.

There is naturally a great deal of talk about law and lawyers between the two. This is perhaps of greater interest than value, as the correspondents seldom permitted themselves enough space to develop the points which they touch upon. There are some controversies which are pursued amusingly throughout the whole correspondence, notably that about the essential nature of a contract; Holmes holding that it is an obligation to pay *damages nisi*, while Pollock regarded this as "a superfluous fiction." They argue about this at intervals for about thirty years. Generally, however, they are in agreement in their notions about the common law, even when these are opposed to current beliefs and philosophies. Both are suspicious of sociological theories of jurisprudence; indeed, Holmes is not fond of theories of any kind, his "intellectual furniture consists of an assortment of general propositions which grow fewer and more general as I grow older." In Pollock's view Bigelow's "otherwise meritorious book on Torts is disfigured by a lot of talk about 'social forces' and 'direction of economic energies.' It isn't so easy as he thinks to see which way the world is going. Besides I reserve the right of saying, when I choose, that the world's way is wrong."

One notable instance of their agreement in opposition to prevailing views is their treatment of monopolies. Neither had been a convert to the prevalent *laissez faire* philosophy of their youth with its hatred of every form of monopoly. Holmes, in particular, regarded the anti-trust agitation, and the Sherman Act especially, as a lot of "humbug," and praises "the originality, the courage, the insight shown by the great masters of combinations." He regards the enormous "stream of products" which he thinks has placed the mass of Americans beyond want, as due to these captains. There are still "great wastes in competition, due to advertisement, superfluous reduplication of establishments, etc. But these are the very things the trusts get rid of." Pollock on the whole, however, prefers the monopolies "to be in public hands."

One matter in which all students and, indeed, most practical lawyers are at one with Pollock and Holmes is in their detestation of long judgments —says Holmes: "When all you really have to say can be told in two pages, and your argument is ABC, why dilate?" Why, indeed?

In politics Holmes is throughout a good-natured sceptic, with a conservative bias; that emotional sympathy with the underdog which makes many a radical comes out chiefly in his judgments—the conservative in politics is often a liberal judge. Pollock's early liberalism and tolerance fade rapidly with the advance of the Labour Party, "with its frank and

blatant policy of plunder," as a factor in English politics. Possibly because in this country the danger of socialism appeared to be imminent, he seems sometimes quite to lose his head and his temper. His criticism of MacDonald and other left-wing politicians becomes mere vituperation, but a dictator "Mussolini is a man at any rate." "Ramsay MacDonald is rational in the sense of being neither a fool nor as ignorant as Lloyd George, but he is a feeble and futile opportunist . . . doubtless God could have made a more contemptible worm than Ramsay MacDonald" (words written long before that statesman betrayed his party). For such a close student of political philosophy Pollock had a remarkable absence of political insight, witness his praise of the Versailles Treaty.

Holmes also hated socialism, "its argument never gets much further than look at the big house and the little one." The capitalistic organisation of economics results in a great flow of products into the home and the stomachs of the people; their liberties are on the whole safeguarded by the law; and the wealth extracted by the captains of industry in the form of luxuries is a minute fragment of the whole, and not too great a return for the services rendered. There is really, therefore, no point in socialism, and in any case it is a great danger to liberty.

Holmes and Liberty would furnish material for a chapter. Among recent American judges he, of course, takes first place as an upholder of civil liberties. It is a shock to find that he seems to have had little genuine belief in liberty as a principle of politics: "Free speech (in which in the abstract I have no very enthusiastic belief, though I hope I could die for it)." During the war he seems to have considered liberty a superfluous luxury, though he never perhaps gets so far as Pollock's frank "my private opinion is that there is no liberty of the subject in time of war within the realm." The truth seems to be that Holmes's passion for liberty was rested on an emotional basis: "I have had to deal with cases that made my blood boil, and yet seemed to create no feeling in the public or even in my brethren."

As has been said, the friends were great and wide readers. Pollock seems to have started this earlier, and no doubt had more leisure. His taste is catholic and his appetite omnivorous. Holmes had a curious predilection for the ultra modern: "When I read old books, I always have a horrid misgiving that I am wasting time . . . all books are dead in twenty-five years, but luckily the public does not always find it out." Fortunately for his own enjoyment, he did not pursue this doctrine to its logical conclusion. He is more level-headed in his judgments than Pollock and reproved the latter for rather intemperate attacks on Wells and Shaw.

Religious and philosophical problems come into the discussion from time to time. Pollock had the wider knowledge of such matters; Holmes the greater interest in them. Both are sceptical of orthodox religious beliefs, and the searching intellect of Holmes in particular is impatient with the woolly efforts of William James to keep one foot inside the gate of heaven. Neither does he take kindly to the orthodox philosophies. He describes himself as a "bet-tabilitarian (one who thinks that you can bet about it but not know)," and his only belief seems to have been that there are certain rational sequences of ideas and events in the world which can be perceived intellectually and should be held fast to emotionally —this is another aspect of his statement that "the chief end of man is to form general propositions," though the sceptic in him adds that "no general proposition is worth a damn."

As one would expect, the more emotional Holmes is the more sensitive to beauty and has the deeper feeling for poetry. Pollock's education gave him wide familiarity with the poets, and he was an accomplished verse writer—indeed, the letters contain a number of polished efforts from his pen. Here and there in Holmes's prose, however, as when he refers to the death of his wife, there is a glow of real poetic feeling. Holmes, too, took great pleasure in visual art, and was a collector of etchings, to which he refers repeatedly in his letters, without evoking any response from Pollock.

At the end of the second volume one feels that one has spent many hours in the intimate company of two wise, cultured, humane, and witty gentlemen, and one feels a certain pride that they were lawyers.

R. S. T. CHORLEY.

EARLY AMERICAN LAND COMPANIES. By SHAW LIVERMORE (Associate Professor of Economics, University of Buffalo). Publications of the Foundation for Research in Legal History, Columbia University School of Law. English publishers: Humphrey Milford. 327 pp. Price, **15s.**

Professor Livermore has made an immensely valuable contribution both to legal and to economic history. Legal history tends to be formal: economic history is still young and is still written in broad outline, much of its field has never been subjected to the microscope. Professor Livermore has taken a soft pencil and with infinite care has shaded in one small corner of the picture. He is concerned with early American land companies and their influence on corporate development. His treatment of the whole subject is a further confirmation of the continuous, close and complex interaction between the formal and the subjective in every historical sphere. Between any two statutes such as the Bubble Act of 1721 and the Limited Liability Act of 1851, the real history of corporate development reflects not only the aftermath of the one but also the preconditions of the other. The author seeks to show that long before the enactment of the general incorporation laws in the United States and the Registration Acts in this country, there existed companies which were essentially corporate entities, although they were not recognised as such by law and although, in fact, they were "stubbornly dubbed partnerships by the courts until well into the nineteenth century." The usual explanation of the origin of the modern private business company is that it grew, by easy stages, out of the mediæival partnerships and the chartered companies of Elizabethan days.[1] This explanation is considered inadequate and we are asked to turn our attention rather to the practical, informal associations of business people who worked on a corporate basis, charterless and unrecognised by the law. American land companies in the half century before and the half century following the Revolution (1783) are the illustration chosen for this more general thesis.

American land companies, in their turn, are the product of many precedent forms of association. In the sixteenth century, in this country and in America, there existed craft gilds which as often as not were unincorporated,[2] and which thus demonstrate the point that the form of business association was not bound by the law. Later town proprietor-

[1] W. R. Scott: *Joint Stock Companies to* 1720.
[2] George Unwin: *Gilds and Companies of London.*

ships of the corporate colonies in New England "afforded a training ground" for land-speculators-to-be. And general business organisation in the colonies—shipping companies, iron works, merchandising—assumed forms of association markedly divergent from the partnership and from the chartered corporation. The Bubble Act itself drove underground, temporarily, explicit company organisation, but in actual fact the effect of the Act was to reinforce the growing realisation in commercial circles that illegality was no real obstacle to corporate activity.[3] And finally, continental business forms, especially the French *association en participation* and the *commandite* partnership were well known to Americans by the turn of the eighteenth century.

Professor Livermore devotes his two longest chapters to a descriptive and analytical treatment of pre-revolutionary and post-revolutionary land companies. We have no quarrel with him. Some twenty companies are considered, none of which possessed charters, and which in historical perspective show the evolution from the Ohio Company of 1748, which was, by all the usual tests, essentially a partnership, through the regulated companies such as the Erie Company and the Connecticut Land Company, which in form were the American counterpart of the regulated company of Merchant Adventurers in this country, to the post-revolutionary North American Land Company, which functioned on a wholly corporate basis with president, board of directors, transferable shares and annual meetings.

The attitude of the business community was clearly that a charter was not necessary nor even desirable for land merchandising. Only in particular fields did the privileges of a charter seem significant. In banking and in transport, for instance, private association was specifically forbidden. In insurance, limited liability was required to attract the necessary capital and it was the prerogative of the State to give or to withhold limited liability.

The attitude of the legislature and the courts was more complex; the political and jurisdictional struggles around the East India Company in this country are familiar enough and the American colonies obviously inherited "a curious composite of attitudes toward the chartered corporation." There was in particular an interesting trend towards "hamstringing" the corporate body after 1800 which, as the author points out, historians have either not noticed or have lightly accepted. The real explanation of this trend is not simple. All through the eighteenth century the fear of monopoly had been an important constituent of the legislative attitude to corporations. Why did this fear constantly reassert itself? This point is crucial to Professor Livermore's whole thesis because so long as the chartered corporation was an attractive business form to the commercial world there was no reason why the private association should have found favour. In the vagaries of legislative action and judicial interpretation, therefore, must be sought a large part of the explanation of the prevalence of informal association in America in the early nineteenth century. The forms that legislative restriction took were many, but "why" is occasionally as interesting as "how," and on this point Professor Livermore has not a great deal to say. The rise of Jeffersonian democracy and the decline of the influence of England are connected, of course, with

[3] One might perhaps compare this with the effect of the 1799 Combination Act in England which drove underground the nascent trade unions and in so doing influenced the whole character of early industrial combination. Illegality left its mark on the business company and on the trade unions.

the growing unpopularity of the monopolistic charter, but which was the horse and which the cart? Or, what seems more likely, were not both Jeffersonian democracy and the tightening of the legal hold products of a third factor which, in general terms, can be expressed as the more rapid opening up of the new West after the fall of Napoleon? The rise of new, enterprising independent business groups on the one hand and on the other the need of the State and the administrative classes to strengthen their ties with the established business community—this, surely, was the background to the legislative attitude and to the rise of Jeffersonian democracy and it was this which led the state to raise taxation for public projects on the basis of charters or to insist that the State itself become a stockholder in the chartered corporation.

By the early nineteenth century the informal business company was fully fledged and evoked considerable juristic disapproval until respectability was granted by the general acts of 1830–1875. Decision after decision reflects the hostility of the State judges to the unauthorised assumption by associations of the normal attributes of the corporation. In the eyes of the law if a business unit had received no charter it was a partnership and thus had no legal personality; it could not take title to real property as such, and it could not rightfully concentrate power in the hand of a selected managerial committee and, most important, it could not limit liability. Slowly the temper of the courts changed. No legal status was given to the unincorporated company but imperceptibly they began to secure legal precedent to the rights of the chartered body. In general Professor Livermore seems to attribute the attitude of the courts largely to inertia, and it is certainly true that the legal framework of society exhibits particular inflexibility and constantly acts as a conservative influence on social change.

After nearly three hundred pages of singularly penetrating analysis of a large number of original records and a great deal of secondary source material, Professor Livermore comes to the unequivocal conclusion that—

> "Charters granted to separate enterprises by state legislatures, and in England by Parliament, have been regarded as the sole milestones marking the development of business enterprise prior to the general acts of 1830 and after. This is historically inaccurate; furthermore, this belief has led to a distorted interpretation of the legal and economic significance of the general acts of incorporation which have since become universal. The undercurrent of economic evolution was in the direction of free incorporation as a *right* of business bodies, not as a privilege to be granted or withheld. The coming of general incorporation privileges was thus not simply a result of dissatisfaction with the delay, whimsicality and occasional corruptibility of legislatures in granting charters, or of a popular fear of monopoly, but was founded equally upon the business fact that private associations had grown in stature and business usefulness to a place of equality with (and even superiority over) chartered bodies. Legal recognition of these private agreements was necessary to secure a proper status before the courts, which characteristically blinded themselves to these developments of 1760–1830."

There are no major criticisms to be made to this competent work. It is well written, fully notated with an excellent bibliography and index, while the subject matter seems to us to constitute a highly significant

contribution to the history of society—and incidentally to show how inappropriate are the divisions of history into "legal" and "economic" when they are applied to any "close-up" of social development.

It verges on ingratitude to insert three complaints. Firstly, we should like to know even more than Professor Livermore tells us about the personnel of these early American land companies. We are told the background of the outstanding figures—George Mason, George Croghan, and Robert Morris, but what about the less important shareholders? To what extent were the shareholders of these unincorporated associations also members of chartered corporations? Was there a distinct cleavage between the established, legal commercial class and the usurpers who formed the personnel of the land companies?

The second point is more substantial. Limited liability is indubitably the *sine qua non* of the modern business company, and as such Professor Livermore deals with the subject rather slightly. He admits that "The limitation of liability is of course a primary aim of modern business groups in choosing the chartered form. But," he goes on to say, "curiously enough, it seemed of little importance in the eighteenth century. . . . Not until after the war of 1812 was there any widespread demand among business classes for limited liability." The phrase "curiously enough" gets under the skin of any historian. The explanation advanced is that, at any rate in the case of American land companies, the risk involved was so slight that limited liability was not a necessary precondition to the attraction of capital. This is true, but we suspect that it is not the whole truth. Limited liability is essentially modern. It belongs to the late nineteenth century, when a whole series of circumstances had at last succeeded in separating the individual from commercial practice. The opposition to the principle of limited liability was moral, religious and psychological, as strong in its way as the earlier opposition to usury. Economic need and economic opportunity gradually undermined this opposition and although it is probably true that the opposition was weaker in America than in this country it seems likely that it was a living part of the society in which early American land companies operated. And, therefore, because these informal companies did not as a rule enjoy the privileges of limited liability and because the chartered corporations usually did, it seems to us that the debt of the modern Joint Stock Company to the informal association is not so undivided as Professor Livermore suggests, whilst on the other hand the contribution of the chartered company, if only on the score of limited liability, should not be underestimated.

This brings us to the final point, which is more general. Is it possible that Professor Livermore is exaggerating the divergence of his whole standpoint from that adopted by other historians of company organisation? He is concerned to substitute informal association for chartered corporation as the origin of the modern business company, but is it really a case of either . . . or? W. R. Scott, writing before the Four Years' War, never went so far as wholly to exclude the influence of informal association: "It would be erroneous to conclude from the existence of the Charter of the Russia Company that this was the sole type of joint stock organisation for foreign trade. In the same year (1553) the African trade was re-opened, and was conducted for a number of years without a charter or a monopoly." Later Scott says, "Therefore, for upwards of a century (from 1720) industry was deprived of the advantages of a certain amount of capital which would

otherwise have been available; till early in the nineteenth century when, in spite of the law, unchartered companies began to be formed." It is probable that Scott is underestimating the role of informal association in the eighteenth century. In any event, Professor Livermore's able analysis of an important sphere of American enterprise shows us the need for a far more thorough investigation into business forms in England between the Bubble Act and the Registration Acts.

JOAN FREEMAN.

LAW AS FACT. By KARL OLIVECRONA, *Professor of Law in the University of Lund (Sweden)*. Oxford University Press, 1939. 222 pages. **7s. 6d.**

Professor Olivecrona's little book deals with the elementary conceptions of jurisprudence on the basis of the legal philosophy of Hägerström and Lundstedt. That philosophy can be shortly summed up as being diametrically opposed to Kelsen's system. For Kelsen the law belongs to the category of normativity, not to that of causation. The facts which it is meant to regulate and even the connection between the law and these facts are outside the sphere of the "pure theory of law." For Hägerström and Lundstedt the category of normativity is a mysticism which it is the task of legal science to unmask. The rules of law belong to the realm of fact. It is futile to search for their "final explanation" and a self-deception to believe that they are commands of the State or of Society. The State itself cannot exist without law. In the realm of fact there exists nobody who could be said to issue these commands. The rules of law are therefore "independent imperatives," whose origin may be traced back historically but which defy further explanation. The idea of a right, if confronted with realities, dissolves into the notion of an imaginary power, ultimately connected with and related to primitive magic. There is no contrast between law and force. Legal rules are "chiefly rules about force, rules which contain patterns of conduct for the exercise of force." In the formation and development of law, as well as in its actual influence on human conduct, fear plays a paramount role, although this fear is sometimes indirect and often even unconscious. The influence of moral ideas on the law is very limited, perhaps even non-existent. The task of the law is the "monopolisation, canalising and harnessing of force" in the service of "public welfare." Where this task is not achieved, as in the case of international law, the law sinks back to being a mere stimulus for human feeling, i.e. to the role of a mere propaganda stunt.

It will be noticed that there is a close affinity between Professor Olivecrona's and his masters' views on the relation between law and State on the one hand and those propounded by Kelsen on the other hand. It is not very surprising that the old rule that "*les extrèmes se touchent*" is thus once more confirmed. The Hägerström-Lundstedt theory has one decisive feature in common with the Kelsen school. By declaring the world of normativity as pure mysticism it cuts off one of the two planes on which the law exists. Unfortunately, however, it differs in so far from Kelsen as it eliminates that one of the two planes which is the special sphere of legal work. Legal practice lives in the world of the ought. So does analytical jurisprudence. This explains the success of the Kelsen school. The pure theory of law presented the law to lawyers as if there were nothing in the world but the law. It was so to speak a view from the inside—a view which might be sufficient for a great many purposes. The Nordic doctrine shows the effects of the law in a world in which spiritual reality

is non-existent. It gives a view of the law as seen from the outside, and that by a man who is colour blind—blind just for those colours with which legal practice has to paint. This explains why it has not produced and cannot produce any results which are of any but very slight concern to the lawyer as such. But I venture to doubt whether its value to the moralist or politician can be any greater. The reference to "Public Welfare" as the end of the law is either a revival of Benthamist eudamonism or a disguised hint that the moral values which Hägerström and Lundstedt attempt to discard are coming in by a back door to claim their rightful place. To the philosopher conceptions of fact and reality which lead to the identification of normativity with "mysticism" or even "animalism" will appear as based on an insufficient analysis of both the idea of actuality and that of normativity. The most important task of legal philosophy is the search for the ideal law. The Nordic school, like the American Realist school, constitutes another escapist attempt to avoid approximation towards this final goal of legal thought.

Professor Olivecrona has the merit to have stated the strange doctrine of his masters with great clarity and admirable sincerity. It is perhaps not easy to imagine how this doctrine could be more attractively, more concisely and more intelligently presented. But there is little prospect of his hope being realised that it will be more widely appreciated in the future.

E. J. Cohn.